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230723



July 27, 2011

VIA FEDERAL EXPRESS

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024

ENTERED
Office of Proceedings

JUL 28 2011

Part of
Public Record

Re: **Finance Docket No. 35468**
Pinelawn Cemetery -- Petition for Declaratory Order

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **Reply of New York & Atlantic Railway Company to Amended Petition for Declaratory Order**, dated July 27, 2011. Please note that the Reply includes color photographs.

One extra copy of the Reply and this letter also are enclosed. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

Thomas J. Litwiler
Attorney for New York & Atlantic
Railway Company

TJL:tl

Enclosures

cc: Jessica P. Driscoll, Esq.
Jay Safar, Esq.

ORIGINAL

[Contains Color Copies]

230723

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35468

PINELAWN CEMETERY --
PETITION FOR DECLARATORY ORDER



**REPLY OF NEW YORK & ATLANTIC RAILWAY COMPANY
TO AMENDED PETITION FOR DECLARATORY ORDER**

**ENTERED
Office of Proceedings**

JUL 28 2011

**Part of
Public Record**

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**ATTORNEYS FOR NEW YORK & ATLANTIC
RAILWAY COMPANY**

Dated: July 27, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35468

PINELAWN CEMETERY --
PETITION FOR DECLARATORY ORDER

**REPLY OF NEW YORK & ATLANTIC RAILWAY COMPANY
TO AMENDED PETITION FOR DECLARATORY ORDER**

New York & Atlantic Railway Company ("NY&A")¹ hereby submits this reply to the Amended Petition for Declaratory Order ("Petition") filed herein by Pinelawn Cemetery ("Pinelawn" or "Cemetery").²

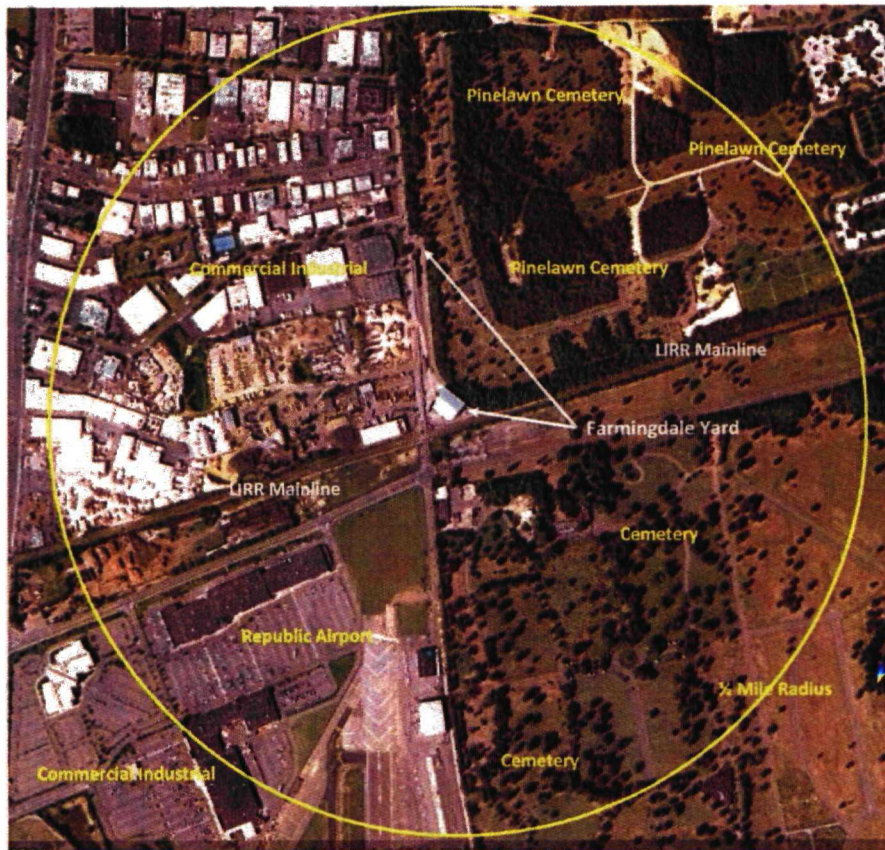
PROCEDURAL POSTURE

Pinelawn comes before the Board seeking to dispossess two rail common carriers, NY&A and The Long Island Rail Road Company ("LIRR") from a 4.9 acre railroad facility

¹ Because the interests of The Long Island Rail Road Company ("LIRR") and NY&A in this proceeding are substantially similar, LIRR has concurred in the arguments set forth herein, and LIRR and NY&A are sometimes jointly referred to as "the Railroads."

² Pinelawn's filing was initially submitted on January 25, 2011 in Finance Docket No. 35057, and was entitled a "Petition to Reopen." By decision served February 24, 2011, the Board correctly recognized that this Petition is not a continuation of the earlier STB proceeding. The prior proceeding was brought by a municipality seeking to enforce its zoning ordinance against a single activity occurring on a portion of the railroad facility; the Board determined that the particular operator was not acting "by or under the auspices of a rail carrier" and thus its operation was not subject to ICCTA preemption. (We refer to the previous litigation concerning Babylon's zoning ordinance as "the *Babylon* litigation".) This petition does not involve municipal regulation. Neither the Town of Babylon nor the operator is even a party in the present proceeding. Rather, this matter raises the broad question -- with far-reaching policy implications -- of a railroad's ability to retain possession and the opportunity to operate over critical rail infrastructure that has become part of the national railroad system through more than a century of continuous use and occupancy for railroad transportation purposes. Accordingly the Board assigned a new docket number to this petition, Finance Docket No. 35468. On May 2, 2011, Pinelawn sought to amend its Petition, reversing its previous legal position. The Board granted Pinelawn's request by order served May 13, 2011.

located in Babylon, New York on the LIRR Ronkonkoma branch mainline at milepost 31.5, between Farmingdale Station at milepost 30.2 and Wyandanch Station at milepost 34.7 ("Farmingdale Yard" or "Yard").³ The Farmingdale Yard is an existing, active and essential rail transportation facility that has been in continuous railroad use by LIRR or NY&A for over a century.



³ The term "Farmingdale Yard" has historically and commonly referred to the entire 4.9 acres of real estate together with some 2,262 feet of yard track located at the intersect of New Highway and LIRR mainline in West Babylon, New York. The Board, the courts and the parties in the *Babylon* litigation sometimes used the moniker "Farmingdale Yard" as a shorthand reference to the 23,812 sq.ft. shed within the Farmingdale Yard at which transloading of bulk materials has been occurring. Oddly, Pinelawn now refers to the 4.9 acre yard as the "Farmingdale Tracks," while using the term "Farmingdale Yard" to continue to refer to the shed. Pinelawn's nomenclature results in misleading statements suggesting that Coastal Distribution built the railroad yard in 2003, e.g. Amended Petition, pp. 5-6, 19, when in normal English usage the Farmingdale Yard was constructed by LIRR in the first decade of the 20th Century.

The parties are before this Board only because of a ruling of the Supreme Court of the State of New York Appellate Division, Second Judicial Department ("New York Appellate Division") (discussed in detail *infra*). Pinelawn filed suit in Suffolk County Supreme Court in 2004 claiming that one of the two 99-year leases conveying to LIRR the real estate comprising Farmingdale Yard had not been validly renewed, and seeking to evict LIRR and NY&A from that parcel ("the 1904 Parcel"). The trial court determined that it did not have jurisdiction to evict an active railroad operation from that parcel and dismissed the case. The appellate court agreed that state courts were preempted from evicting active railroad operations, but held that, instead of dismissing the action, the trial court should have stayed the action pending a ruling from this Board as to "whether the subject railroad has been abandoned." *Pinelawn Cemetery v. Coastal Distribution, LLC*, 906 N.Y.S.2d 565, 566 (2nd Dept. 2010).

State court litigation concerning Farmingdale Yard is still ongoing and likely will continue for some time. In addition to the lease renewal suit that lead to this petition, two other state court proceedings are pending, and additional disputes originally brought in the *Babylon* litigation will soon be added to the state court proceedings.

First, in January 2010, NY&A and LIRR sued the Town of Babylon in state court for a declaratory judgment that the Town's zoning ordinance was preempted from application at Farmingdale as a matter of state law. Under the New York Public Authorities Law, Section 1266 (8), the Metropolitan Transit Authority has wide-ranging authority over use of its property. That case is still pending in Suffolk County Supreme Court. *New Y. & A. Ry. Co. et al. v. Town of Babylon*, Suffolk Co. Index No. 10-00692.

Second, the federal Magistrate Judge who heard the original *Babylon* litigation determined that under New York state law, the Town of Babylon was estopped from changing its

position on the zoning issue after the NY&A and its operator detrimentally relied on the town's previous refusal to exercise jurisdiction over Farmingdale Yard. Both the state pre-emption and estoppel claims were raised in the *Babylon* litigation under the federal court's supplemental jurisdiction, but they have languished without decision while the federal issues have been litigated. Now that the federal issues are resolved, these potentially dispositive state law issues will move forward in state court.⁴

Finally, in 2008, Babylon, at the request of Pinelawn, began assessing real estate taxes on LIRR with respect to the Farmingdale Yard. That action also resulted in litigation involving application of the Public Authorities Law, and that case is also pending in the Suffolk County Supreme Court. *Pinelawn Cemetery v. Metropolitan Transportation Authority et al.*, Suffolk Co. Index No. 09-04452. Thus there are no less than three pending state court proceedings involving the application of state law to the Farmingdale Yard which are potentially dispositive of Pinelawn's claims and which are all presently stalled awaiting this Board's action.

Meanwhile, of course, subsequent legal developments have resolved the federal preemption issue raised in Pinelawn's 2004 lease renewal case. This Board subsequently ruled that it lacks jurisdiction over the current operator of the transloading shed, and the Board's decision has been upheld on appeal. *New York & Atlantic Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66 (2nd Cir. 2011). Accordingly, the principal federal preemption issue in all this litigation

⁴ Judge Seybert in the *Babylon* litigation has indicated that if the Second Circuit affirmed the STB's decisions in the *Babylon* cases, she intends to dismiss the supplemental state claims without prejudice to allow those issues to proceed to resolution in the state courts.

has been resolved. However, the state law proceedings cannot move forward until the stay ordered by the state appellate court has been satisfied.⁵

Pinelawn chose not to comply with the New York Appellate Division's ruling that it should file an adverse abandonment proceeding to determine "whether the subject rail line has been abandoned," but instead asks the Board to find "that there is not now -- and there never was -- any 'rail activity' to abandon..." and therefore to issue an order that:

- (1) no rail activity is or was occurring on the Property [*sic*];
- (2) the STB does not have jurisdiction over the Farmingdale Yard [*sic*], which is Private Track and is fully subject to state and local regulation;
- (3) no application for abandonment is necessary; and
- (4) the State Court has jurisdiction to resolve the state law claims.

Amended Petition at 27. Alternatively, Pinelawn seeks procedural guidance on how to terminate the railroad's use and occupancy of "the Farmingdale Yard" (although the only real estate at issue is the 1904 Parcel, not the "yard" or the transloading shed).

SUMMARY OF RAILROADS' POSITION

The Railroads accept many of Pinelawn's arguments. We agree that:

1. Pursuant to the Board's decisions in *Town of Babylon v. Coastal Distribution, LLC*, Finance Docket No. 35057, affirmed in *New York & Atlantic Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66 (2nd Cir. 2011) ("the *Babylon* litigation"), the Board does not have exclusive jurisdiction under 49 U.S.C §10501(b) over the activity of the current operator of the transload shed, located within the Farmingdale Yard on a portion of the 1904 Parcel.

⁵ Because the basic federal issue has been resolved this petition is unnecessary, and the Railroads have attempted to obviate the necessity of proceeding before the Board. The Railroads submitted several draft stipulations to Pinelawn acknowledging the resolution of the federal preemption issue and the state court's jurisdiction over state law questions, but Pinelawn has declined to accept those attempts, leaving the Railroads with no alternative but to oppose its evolving legal theories.

2. Pursuant to 49 U.S.C. §10906, the Board has no regulatory authority over railroad construction or removal of the track located on the 1904 Parcel, and no action by the Board is required for the Railroads to abandon or discontinue rail service over said track.

3. Whether the 1904 Lease was validly renewed, reinstated or otherwise continues in full force and effect is a question of state law for resolution by the New York state courts, and those courts should be allowed to resume further proceedings.

However, the Railroads vigorously contest Pinelawn's other assertions and arguments. Specifically, the Railroads assert that:

1. The Farmingdale Yard, including the portion located on the 1904 Parcel, is an existing, active and essential rail transportation infrastructure that has been in continuous railroad use by LIRR or NY&A for over a century.

2. The Board retains exclusive jurisdiction over the real estate and tracks located on the 1904 Parcel, even though the tracks constitute "excepted track" under Section 10906, and even though the Board lacks jurisdiction over the current operator of the transload shed.

3. Neither Farmingdale Yard nor the tracks on the 1904 Parcel are "Private Tracks."

4. By allowing the current operator to use the transloading shed, and by continuing to litigate the railroads' rights to use that facility and property, neither NY&A nor LIRR have abandoned railroad use of the 1904 Parcel.

5. Removal of Farmingdale Yard from the national railroad system would be contrary to the public interest.

6. Nothing precludes the state courts from resolving the question of whether the 1904 Lease was validly reinstated and renewed pursuant to state law.

I. THE STB SHOULD DISMISS THE PETITION AS MOOT

The Railroads raised the federal preemption issue at the outset of this extended litigation. Since that time, and subsequent to the decision of the New York Appellate Division, the *Babylon* litigation has definitively resolved that federal preemption under ICCTA does not apply to the activities of the current transload operator at Farmingdale Yard. Although we do not agree with that result, the Railroads understand and fully accept that this issue has been finally adjudicated. Because all parties now agree that the question of the validity of the reinstatement and renewal of the 1904 Lease is a matter of state law and the principal federal preemption issue is resolved, this Board should simply dismiss the petition for declaratory order as moot in light of the Board's previous decisions and their affirmance by the Second Circuit.

It is possible that a different federal preemption issue could arise in the future. Although it is unlikely,⁶ the state courts could determine that the 1904 Lease is no longer valid or effective, in which event a question of remedy would arise. In that eventuality, we expect that a compensatory damages award would be entertained. However, if Pinelawn sought to recover possession of the 1904 Parcel, the Railroads would likely take the position that the state courts lacked authority to evict an active railroad user from the Parcel. But that issue would arise only in the unlikely event that Pinelawn prevails on the substantive lease issue and the state courts determined that awarding possession was appropriate. There is no reason to assume that the state courts will ignore the impact such relief would have on interstate commerce by removing a

⁶ Attached to this Reply as Exhibit 1 is a copy of the letter agreement prepared by LIRR and mailed to counsel for Pinelawn that renewed the leases. It is signed by the President who added in his own hand that the renewal applies to the 1904 Lease as well as the later, 1905 Lease. The letter was delivered personally by Pinelawn's Executive Vice President.

critical piece of infrastructure from the national railroad system. In any event, by the time that issue arises, the other potentially dispositive state law issues may have made such relief moot, or NY&A or LIRR may have made other arrangements for operations involving the transloading shed. It is simply premature at this time and wholly unnecessary to resolve the extent and nature of this Board's preemptive jurisdiction over speculative relief concerning the 1904 Parcel.

II. THE STB RETAINS EXCLUSIVE AND PREEMPTIVE JURISDICTION OVER THE FARMINGDALE YARD

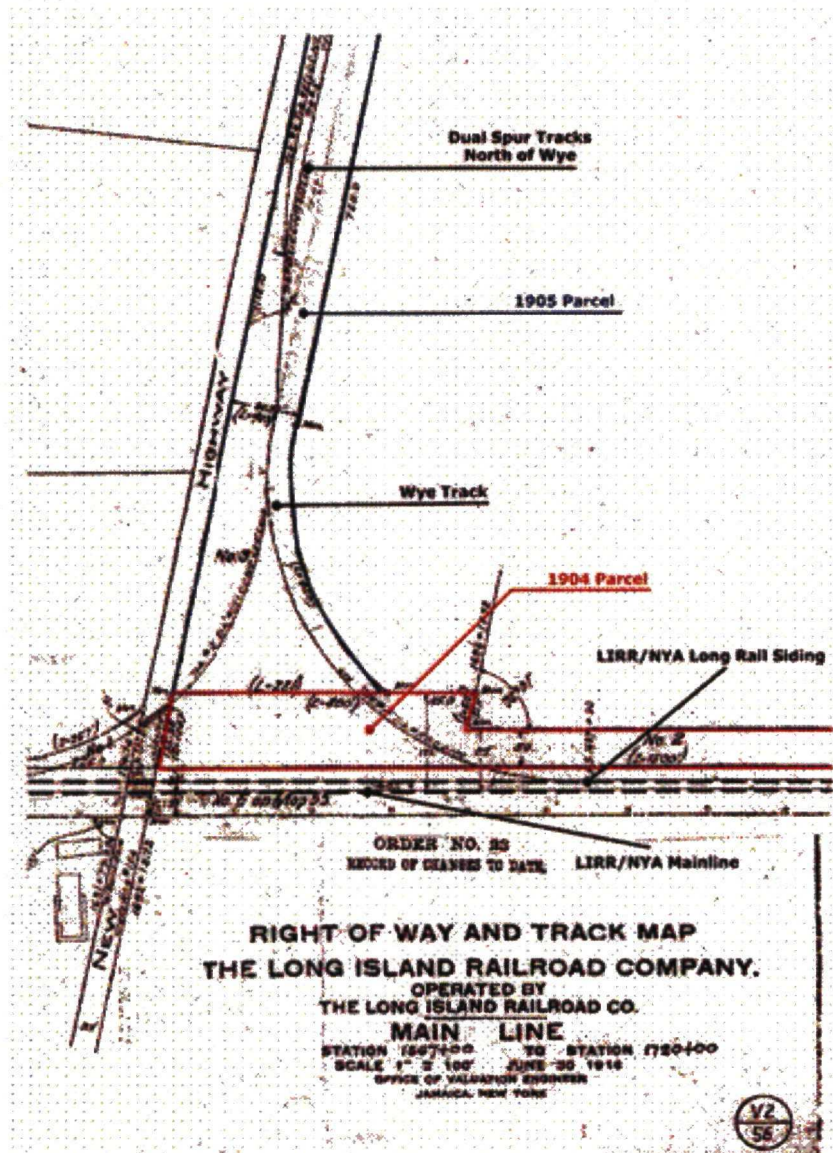
In the event this Board decides to address the question of its preemptive jurisdiction over the Farmingdale Yard at this time, the Railroads suggest that the Board's exclusive jurisdiction continues to preempt Pinelawn's efforts to convert this unique piece of railroad infrastructure into cemetery plots or other "higher value" non-rail use. To demonstrate the Board's continuing jurisdiction, we first review the nature of the Farmingdale Yard and then set forth the legal reasons in support of this conclusion.

A. The Nature and History of the Farmingdale Yard

1. The Historical Use of Farmingdale Yard

The Farmingdale Yard was constructed by LIRR on two parcels leased from Pinelawn. The first lease, dated August 30, 1904, conveyed a 2.1 acre tract of land directly adjacent to LIRR's mainline ("1904 Parcel"). The second lease, executed as of November 1, 1905, transferred the 2.8 acres of land immediately north of the 1904 Parcel ("1905 Parcel"). Both the 1904 and 1905 leaseholds were for an initial term of 99 years and each granted LIRR the right to renew for a subsequent 99 year term. As shown below, on LIRR's official track map dated June 30, 1916 and with overlays locating the 1904 and 1905 parcels, LIRR constructed 158 feet of wye track on the 1904 Parcel and, on the 1905 Parcel, installed the remaining 685 feet of

wye track, as well as 1,419 feet of dual spur track. The spur track extends some 1,215 feet from the LIRR mainline.



Since the early 20th Century LIRR used the Farmingdale Yard to turn locomotives and railcars, as well as to transload freight between rail cars and highway vehicles. From the late 1920s through the early 1960s, the Yard's location northeast across Conklin Street from Republic Airport, combined with the 98-railcar capacity of the Long Rail Siding adjacent to the 1904

Parcel, provided the LIRR with necessary freight service capabilities for West Babylon's burgeoning manufacturing businesses, including the Fulton Truck Company, Fairchild Aircraft, Sikorsky Aircraft, Willard Sand & Gravel, Picone Bros. Concrete and Guggenheimer Pickle Works, all located a half a mile west of the Yard. See Emery Map, June 1958, attached hereto as Exhibit 1, page 1.

Rail freight service on Long Island, including West Babylon, withered over the decades after 1960, as many rail shippers went out of business or converted to truck service, private sidings were removed and the real estate adjacent to rail lines was redeveloped for commercial or residential use. The rail transportation activity at the Farmingdale Yard nonetheless persisted, with LIRR transloading various types of freight, including telephone poles, brick, and plastic pellets; accepting delivery of ballast; conducting intermodal operations by loading highway trailers onto rail cars and vice versa; consolidating all of the waste generated from its entire passenger and freight system, where it was compacted and reloaded into trucks for disposal at a landfill; and storing materials in the Yard for maintenance of LIRR way and signal departments. See Verified Statement of John B. Curcio, LIRR Deputy General Counsel, being submitted separately by LIRR ("Curcio V.S."), ¶4; *see also* Farmingdale Yard aerial image dated April 7, 1994, attached hereto as Exhibit 2, page 2.

In the early 1990s, New York Governor George Pataki determined that vehicular congestion on Long Island could be alleviated by encouraging freight rail transportation instead of trucking. Because the LIRR's primary focus had become commuter service, the State of New York decided to privatize LIRR's freight service in the hopes of increasing freight rail use and subsidizing the LIRR commuter operations. LIRR's freight franchise was put out to bid in 1996

and was thereafter privatized when LIRR entered into a Transfer Agreement with NY&A⁷ ("Transfer Agreement"). The Transfer Agreement conveyed to the NY&A, for a term of 20 years (with the right to renew for another 10 years if certain traffic volume and safety thresholds were met) the exclusive right to operate LIRR's freight franchise, the exclusive right to utilize certain property used solely for freight service, and the joint right to operate over certain LIRR mainline tracks. The STB authorized the transaction on January 10, 1997. STB Finance Docket No. 33300. One of the freight properties leased to NY&A was the Farmingdale Yard. NY&A has the right to occupy, operate and use the Yard for the duration of the Transfer Agreement and to fulfill LIRR's common carrier obligations. Like all the improvements on LIRR's freight property, the rail, ties, switches, scales, buildings, fixtures and all other improvements installed on the real property of the Farmingdale Yard are owned by LIRR and available for use by the NY&A during the term of the Transfer Agreement. At the expiration of the Transfer Agreement, LIRR will resume possession of its freight property and will discharge its freight obligations unless it renews the contract with NY&A or contracts with another operator. Verified Statement of Bruce A. Lieberman, attached hereto ("Lieberman V.S."), ¶2.

At the time NY&A took over freight service, the Farmingdale Yard was being used to load highway containers on and off railroad flatcars, to load and unload large pieces of freight, and to gather the waste generated by LIRR's passenger operations and transfer it to trucks for disposal. The Yard's wye track was also used to turn cars and locomotives to operate in the opposite direction. Lieberman V.S., ¶5. As there are no modern industrial parks or intermodal yards on Long Island, increasing freight rail service has become largely dependent on transloading, i.e. transferring freight between rail cars and trucks at transload facilities. Thus, to

⁷ At the time, NY&A's name was Southern Empire State Railroad Company.

achieve New York's policy goal of reducing highway congestion on Long Island, NY&A has attempted to shift long-distance truck shipments to local moves to and from its rail facilities, where the freight can be loaded and unloaded to and from railcars. Most of the rail freight business developed by NY&A since 1997 has been developed via such transload facilities. Lieberman V.S., ¶3.

The Farmingdale Yard is the only property east of Nassau County transferred to NY&A that is large enough to accommodate significant transload operations for bulk materials. It is also well suited for rail transload activities because it is located on a busy highway in an industrial area, backing up to a cemetery at the end of a cemetery and at the end of a runway for the local airport. No residences are located within a half-mile of the railroad yard. Lieberman V.S., ¶5. When NY&A began operations, it quickly realized that it needed an experienced transload operator. NY&A first invited a subsidiary of CSX Transportation, Inc. ("CSXT") in 1999 to market rail service through transloading at Farmingdale and conduct transloading operations for NY&A. However, CSXT was unable to produce any measurable new rail traffic. Lieberman V.S., ¶6; Farmingdale Yard aerial image dated March 31, 2001, attached hereto as Exhibit 2, page 3.

In 2002, NY&A entered into an agreement with Coastal Distribution, LLC ("Coastal") under which Coastal would conduct transload operations at the Yard. Having identified the types of freight that could be captured for transloading, NY&A and Coastal also determined that an enclosed transload facility building covering part of the existing tracks would be necessary to properly transfer such freight. Lieberman V.S., ¶7.

In the late summer of 2003, NY&A became aware that the LIRR did not own the Farmingdale Yard, but had leased it from Pinelawn, and that LIRR had not timely renewed the

lease for the 1904 Parcel. Coastal and NY&A agreed that any further construction or development activity could only occur after it was certain that LIRR and NY&A would be able to continue their use and occupancy of the Farmingdale Yard for rail transportation. *Lieberman V.S.*, ¶8.

On October 23, 2003, the Executive Vice President of Pinelawn attended a meeting held in the construction trailer at the Farmingdale Yard, at which time he delivered a three sentence letter agreement that had been prepared by the MTA and certified mailed to Pinelawn's attorney. The letter agreement was signed by Stephen Locke, the President of Pinelawn, and in it Pinelawn and LIRR explicitly agreed to reinstate and renew the lease for the 1904 Parcel and to renew the lease for 1905 Parcel, extending them to 2102 and 2103, respectively. The letter agreement provides in part as follows:

We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below

Next to his signature, Mr. Locke wrote, in his own hand, "This concurrence refers to Aug. 30 1904 lease." A copy of the agreement is attached hereto as Exhibit 1; *see also* *Lieberman V.S.*, ¶9 and Attachment A. On January 15, 2004, Pinelawn's attorney wrote a letter claiming that Pinelawn had not and would not renew the 1904 Lease, and demanding that NY&A and Coastal remove all structures from that portion of the Yard.⁸ Since the 1904 Parcel includes the only access to the LIRR mainline, the portion of the Yard on the 1905 Parcel would be useless for rail transportation purposes without use of the 1904 Parcel as well. *Lieberman V.S.*, ¶10. This

⁸ In December 2003, unbeknownst to NY&A and Coastal, Pinelawn notified the Town of Babylon that LIRR's lease to the Farmingdale Yard had expired, and demanded that the Town issue a Stop Work Order for the construction of the transload structure. The subsequent zoning enforcement action by the Town gave rise to the *Babylon* litigation.

interconnectedness is shown below on a September 19, 2010 aerial photo of the Farmingdale Yard, with lease boundary overlays.



In April 2004 Pinelawn commenced an action in the Supreme Court of the State of New York, County of Suffolk ("Suffolk Supreme Court"), against NY&A, LIRR, its parent company, the Metropolitan Transportation Authority ("MTA"), and Coastal, seeking to evict the defendants from use and occupancy of the 1904 Parcel. Although Pinelawn admits that the letter agreement signed by its President effectively renewed the 1905 lease, Pinelawn claims that the same agreement did not effectively reinstate and renew the 1904 Lease. In January, 2008 the Suffolk County Supreme Court granted NY&A, LIRR and Coastal's motion for summary judgment and dismissed Pinelawn's complaint, finding that the state court's jurisdiction over the

subject matter was preempted by the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 83 ("ICCTA"), and that the STB had exclusive jurisdiction to regulate the abandonment of railroads.

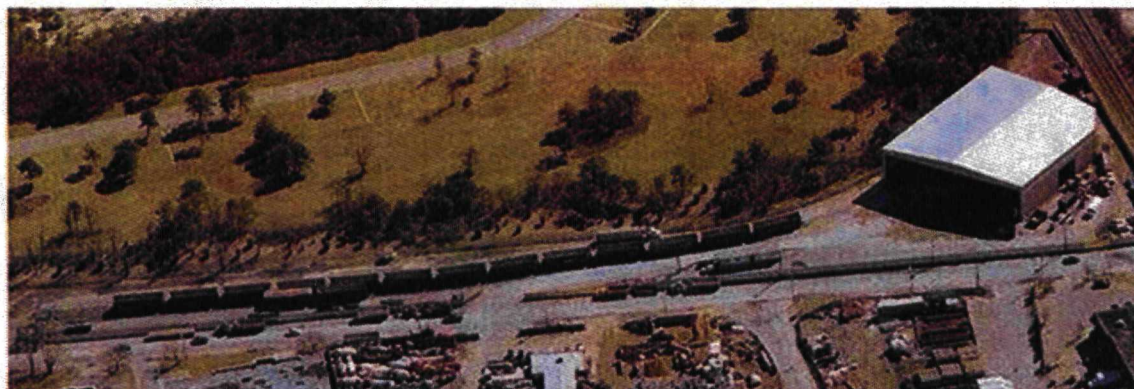
Pinelawn appealed the Suffolk Supreme Court's decision to the New York Appellate Division. On June 8, 2010, the Second District of the Appellate Division agreed that the Surface Transportation Board has exclusive jurisdiction over the forced abandonment of railroad facilities but concluded that rather than dismiss the complaint, the trial court should have stayed proceedings to allow the STB to determine whether railroad use of the facility may be terminated. It remanded the proceeding for entry of a stay "...pending resolution by the United States Surface Transportation Board of the issue of whether the subject railroad has been abandoned" (emphasis added). *Pinelawn Cemetery v. Coastal Distribution, LLC*, 906 N.Y.S.2d 565, 566 (2nd Dept. 2010).

Pinelawn now comes before the Board to force NY&A and LIRR to abandon use and occupancy of active railroad transportation infrastructure that has been utilized by the LIRR or NY&A for over 100 years, and which has dramatically increased rail freight activity since NY&A assumed all freight operations on LIRR's rail system in 1996. Pinelawn's request, Amended Petition at 23, that the Board find that "there is not now -- and there never was -- any 'rail activity' to 'abandon' on the 1904 Parcel is absurd. As set forth above, rail activity in fact has occurred on the property continuously for more than a century.

2. The Current Use of Farmingdale Yard.

The Farmingdale Yard continues today be an active and irreplaceable part of New York State's rail infrastructure. It has become NY&A's and Long Island's largest single generator of rail freight traffic. *See* aerial photo below. Today, NY&A spots 9 to 12 empty cars in the Yard every week night, and pulls a like number of loads to interchange with CSXT at Fresh

Pond, New York. NY&A maintenance crews check the track and roadbed weekly maintaining the facility for regular use. Lieberman V.S., ¶11.



As summarized in the table below, over 21,000 gondola cars of C&D debris have been loaded and shipped by rail since the summer of 2004. Each carload has a capacity equivalent to five 20 ton tractor trailers, and for every loaded truck driving New York roadways, an empty must return. Despite the impact of the "Great Recession" on construction activity, the transload operation at the Farmingdale Yard has already removed in excess of 200,000 truck trips from the region's highways since it opened. *Id.*

Farmingdale Yard Rail Shipments

Year	Railcars Shipped	Freight Tons Shipped	Trucks Removed From Roadways
2004	785	74,575	7,458
2005	2,326	220,970	22,097
2006	3,426	325,470	32,547
2007	3,682	349,790	34,979
2008	3,691	350,645	35,065
2009	2,574	244,530	24,453
2010	3,144	298,680	29,868
Jan - Jun 2011	1,678	159,410	15,941
Total	21,306	2,024,070	202,407

Moreover, the long, drawn-out litigation over the applicability of Babylon's zoning ordinance at this Yard has had an unmistakable dampening effect on shipper's willingness

to use rail transportation. Shippers have expressed reluctance to jeopardize their commercial relationships with trucking firms while the long-term viability of the transload operation is unresolved in the courts. However, the railroads are confident that once that cloud is lifted, volumes will increase substantially. *Lieberman V.S.*, ¶11.

The fact that the current operation is focused on transloading Construction and Demolition Debris does not detract from the Yard's essential railroad function. Indeed, as shown in Figure 11 of the 2009 New York State Rail Plan (included as Exhibit 1 to the Verified Statement of John Rondinaro ("*Rondinaro V.S.*") being submitted separately by the New York State Department of Transportation ("*NYSDOT*")), the single largest component of originating rail freight in New York State is solid waste, a significant contributor to roadway traffic congestion and diminished air quality, and a principal commodity identified by NYSDOT for the energy and environmental benefits of transportation by rail versus truck.⁹

Moreover, NY&A and Coastal have assiduously assured that the Farmingdale facility is operated in a clean, safe and healthy manner. NY&A and Coastal have demanded, since C&D transloading operations commenced in 2004, that the Farmingdale facility be in complete compliance with all state and federal environmental laws. The facility has been issued, and maintains in good standing, a New York State Department of Environmental Conservation Solid Waste Rail Transfer Facility Permit (1-4720-03667/00001). Other than Pinelawn's attempts to regain possession of the Yard, no one -- no neighbor, no governmental agency, no public interest group -- has ever complained about the operation of the facility. *Lieberman V.S.*, ¶12.

⁹ In addition to New York State's acknowledgement of the importance of rail transportation of solid waste for export, New York City has specifically made "truck to rail" the primary methodology for export of the City's 10,000 tons per day of municipal solid waste. See Chapter 3 of the New York City, Department of Sanitation, Comprehensive Solid Waste Management Plan, September 2006, attached hereto as Exhibit 3.

The LIRR supports and encourages use of Farmingdale Yard for freight purposes. It is a direct beneficiary of every carload that moves in or out of the Farmingdale Yard. To retain its rights under the Transfer Agreement, NY&A pays an annual fee of hundreds of thousands of dollars. In addition NY&A pays LIRR a license fee for every loaded car on the system and a trackage rights fee that contributes to track maintenance for every car-mile traveled over the jointly-used tracks. Thus the LIRR/MTA receives a financial subsidy for every freight car movement on its line, as well as being temporarily relieved of its obligation to provide freight service, so it can focus exclusively on its commuter rail service. *Lieberman V.S.*, ¶13.

More than a quarter million tons of freight are being shipped by rail through Farmingdale Yard every year. The Second Circuit expressly concluded, 635 F.3d at 73, that railroad transportation has been occurring at Farmingdale Yard, stating:

As explained above, there is no question that the activity at issue here constitutes "transportation" within the meaning of the statute. The only argument is whether the activities were performed by or under the control of a rail carrier.

There is simply no basis for Pinelawn's bizarre assertion that "there is not now ... any 'rail activity'" at Farmingdale Yard.

The current arrangement whereby Coastal conducts transloading operations focused on C&D debris remains subject to state court litigation. Although the Second Circuit has resolved the question of federal preemption of Babylon's zoning ordinance under ICCTA, there remain substantial unresolved state law issues, notably whether Babylon is precluded by New York's Public Authorities Law, Section 1266 (8) from regulating MTA property and whether Babylon's prior refusal to review plans for the Farmingdale Yard estops the Township from changing its position. As discussed *infra*, final resolution of those issues awaits further litigation in New York state courts, which in turn awaits action by the Board on this petition.

3. The Future Use Of Farmingdale Yard

Both LIRR and NY&A are committed to the continued use of Farmingdale Yard for railroad transportation purposes long into the future. *Lieberman V.S.*, ¶ 16; *Curcio V.S.*, ¶12. Although the parties have been reluctant to change their operating arrangements again during pendency of the state court proceedings, they are not precluded from changing the current operation. If the New York state courts ultimately decide that Babylon's zoning law does bar handling of C&D debris at the transload shed in Farmingdale Yard, the railroad use of the yard will definitely not be abandoned. Prior to its use for C&D transloading, NY&A transloaded a variety of other products at Farmingdale Yard, including aggregate, lumber, particle board and plastic pellets, and NY&A could resume attracting such traffic. Of course, NY&A could resume direct operation of the facility itself, or restructure its operating arrangement to bring the current transload operation within the STB's jurisdiction or within the preemption of New York's Public Authorities Law. Even if NY&A conducted no transloading activity at Farmingdale, there would still be a wye track and some 1,400 feet of dual spur track that could and would be used for switching or car storage or other railroad purposes. *Lieberman V.S.*, ¶16.

LIRR likewise has a long-term interest in maintaining the availability of its yard for railroad use, both for the benefit of NY&A and for itself or a successor freight operator after the expiration of the Transfer Agreement. LIRR unambiguously intends to continue railroad use of the Farmingdale Yard into the distant future. *Curcio V.S.*, ¶12. NY&A and LIRR each insist that the yard will be immediately put to other railroad transportation and freight rail use if the current transload operation is successfully blocked by Babylon; they will cooperate to assure that freight rail use of the Yard continues uninterrupted, before allowing the facility to be lost entirely to future railroad use.

Accordingly, the current, and perhaps temporary, operation of the transload shed covering some of the track on a portion of the 1905 Parcel within the Farmingdale Yard is by no means a limitation on NY&A or LIRR on the long-term use of the Yard or its underlying real estate, nor any indication of any intent to abandon the unique and valuable rail facilities or future use of the 1904 Parcel for rail transportation purposes. The real estate, with its access to the LIRR mainline and local highways, and the tracks and other improvements on the disputed 1904 Parcel are critical elements of the national freight rail transportation system.

B. The Farmingdale Yard Constitutes "Excepted Track" Subject To To The Board's Exclusive and Preemptive Jurisdiction

The wye tracks and dual spur tracks plainly constitute "spur, industrial, team, switching, or side tracks." 49 U.S.C. § 10906. They were used for switching and turning cars and for transloading commodities as varied as agricultural products and building materials for a century. The current use of the tracks for transloading debris continues as a "spur, team, switching or side track." This Board very recently reviewed a nearly identical facility¹⁰ in Philadelphia and concluded that a loading track for transloading municipal solid waste constituted a "spur track" within the meaning of Section 10906. *Swanson Rail Transfer, LP -- Declaratory Order -- Swanson Rail Terminal*, Finance Docket No. 35424 (STB served June 14,

¹⁰ The *Swanson* facility will be used to transload "solid waste, recycled materials, and wood chips brought to the site via truck by the Philadelphia Department of Sanitation and by private businesses." Like Long Island, "currently there are no solid waste transfer stations in the city of Philadelphia which utilize rail to transport solid waste" and "the transload operation will allow 500,000 tons of solid waste generated annually in the Philadelphia area to be moved by rail and will divert 50,000 truck trips each year from the City's roads, thus reducing 'air pollution, congestion, noise, and highway wear and tear, while furthering safety and energy independence.'" *Swanson* at 2. Like Farmingdale, the facility holds a state permit to operate the facility which is located in an industrial area far away and buffered from any residences. Unlike Farmingdale, the city approved the zoning for the facility.

2011) ("*Swanson Rail Terminal*"). The petition sought a determination that no construction authority was needed to build a solid waste transload facility. This Board concluded:

[T]he new track will be used to load onto rail cars commodities brought to the site by truck and to switch traffic to Swanson's relocated main line. ... The intended use of the Swanson track, which is ancillary to Swanson's main line, thus is typical of activities associated with spur track.

Swanson at 4. The Board also noted, *ibid.*, that the facility promotes the public interest:

The City is looking for alternative ways of handling solid waste, and the transfer facility will reduce the number of trucks moving over congested City Streets. The proposal is also designed to benefit shippers by giving them access to more distant landfill areas.

Where excepted tracks¹¹ are used or likely will be used for the provision of rail service by a rail carrier, ICCTA protects those tracks from state or local laws that could be used to dispossess railroads of their ability to use such facilities. The fact that this Board lacks regulatory authority over the construction or removal of excepted tracks does not diminish the Board's exclusive, preemptive jurisdiction over those tracks:

The § 10906 no-authority language means no *authority*, not no *jurisdiction*. These sorts of transactions involving spur track do not call for the Board authorization which is required for construction, acquisition or operation of extended or additional rail line under § 10901 and § 10902, but the Board nonetheless retains exclusive jurisdiction under § 10501(b)(2). . . . [The Board's] jurisdiction over spur track is manifest

United Transp. Union v. Surface Transp. Bd., 183 F.3d 606, 612 (7th Cir. 1999) (emphasis in original). As the Board itself stated in *The New York City Economic Development Corporation – Petition for Declaratory Order*, Finance Docket No. 34429 (STB served July 15, 2004) at 7-8:

Under 49 U.S.C. 10501(b)(2), as broadened by the ICCTA, the Board has exclusive jurisdiction over rail transportation, including "the construction,

¹¹ Section 10906 refers to "spur, industrial, team, switching, or side tracks." Presumably because the title of Section 10906 is "Exception," these are often referred to as "excepted tracks." Yard trackage is an analogous term. *Nicholson v. Missouri Pacific R. Co.*, 366 I.C.C. 69, 73 (1982).

acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State," even though Board approval is not required by such activities. Section 10501(b) further provides that both "the jurisdiction of the Board over transportation by rail carriers" and "the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law. In this proceeding, the Board has exclusive jurisdiction over the planned new track, and state and local regulation is preempted, because the new track will be operated by rail carriers (NS, CSXT, and Conrail) as part of the interstate rail network. The fact that the track owner, petitioner NYCEDC, is not itself a rail carrier is not relevant. And the fact that the new track is outside the Board's licensing authority does not change this outcome. The section 10501(b) preemption applies even in cases – such as the construction of switching and spur track, as involved here – where the Board lacks licensing authority.... (citations omitted).

All other decisions which have addressed the issue reach the same conclusion. *See, e.g., Port City Properties v. Union Pacific R. Co.*, 518 F.3d 1186, 1188-1189 (10th Cir. 2008) ("As a consequence [of ICCTA's preemption language], jurisdiction over 'spur, industrial, team, switching or side tracks, or facilities' rests solely with the STB.... In sum, Congress granted exclusive jurisdiction to the STB over the construction, operation, and abandonment of spur or industrial lines, thereby precluding state regulation."); *County of Dutchess v. CSX Transp., Inc.*, 2009 WL 2913684, *3 (S.D.N.Y) ("First, even if the track was spur or industrial track ... , the STB would still have exclusive jurisdiction. ... Thus, while the STB has exclusive jurisdiction over these tracks, and thus no other entity may regulate them, even the STB may not exercise authority over such tracks, and rail companies may dispose of them as they see fit. This 'jurisdictional void' precludes, rather than permits, jurisdiction over spur or industrial tracks by this or the state court." (citations omitted)); *In re Metropolitan Transit Auth.*, 32 A.D.3d 943, 946, 823 N.Y.S.2d 88, 92 (Second App. Divn. 2006) (even if it were to apply, "49 USC § 10906 complements rather than conflicts with the STB's exclusive jurisdiction over the abandonment of spur tracks under 49 USC § 10501(b)(2) and, in keeping with the deregulatory purpose of the

ICCTA, it does not authorize state or local regulation of spur tracks."); *Auburn & Kent, WA -- Pet. For Declar. Order -- Stampede Pass Line*, 2 S.T.B. 330, 341-342 (1997), *aff'd sub nom. City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999); *compare B. Willis -- Petition for Declaratory Order*, 6 S.T.B. 280, 281 n.2 (2002) ("The Board has jurisdiction over auxiliary tracks, which are part of the common carrier (*i.e.* regulated) rail network, but a Board license is not required to construct or operate them because of the 10906 exception. Thus, track classified as spur, industrial or side track has a regulatory status that private track does not share."), *aff'd sub nom. B. Willis, C.P.A., Inc. v. STB*, 51 Fed. Appx. 321 (D.C. Cir. 2002).

A particularly instructive case here is the Board's decision in *Mark Lange -- Petition for Declaratory Order*, Finance Docket No. 35037 (STB served January 28, 2008), where a landowner similarly brought a state law trespass action against the railroad. The property in question was used for rail maintenance, snow removal activities and access to switching lead tracks and switches, as well as for conductors to walk alongside trains while they performed switching duties. It was not a line of railroad and did not even involve a track. Nonetheless, the Board found preemption applied, and the petitioner could not prosecute a state action seeking to evict the railroad from the property.

To the extent that [a property owner's] trespass suit seeks to dispossess [a railroad] of property that is being used for railroad operations, the state law claims would effectively regulate rail transportation, and thus are preempted under section 10501(b). ... The burden is on Lange to show that ejecting WCL from the property would not unreasonably interfere with the carrier's rail operations, and Lange has not rebutted WCL's evidence. Therefore, such relief is preempted.

Lange at 3, 4.

Like *Lange*, the practical effect of Pinelawn's petition, if granted, would be to permit a state court to order the removal of a rail facility from operation, but this Board has recognized that Congress deliberately foreclosed such a possibility.

**C. None Of The Track At The Farmingdale Yard
Has Ever Been Private Track.**

In its amended petition, Pinelawn now takes the position that the Farmingdale Yard is Private Track and has always been Private Track outside the jurisdiction of the STB and the ICC before it. There is no factual or legal basis for this latest reversal of Pinelawn's position.¹²

Pinelawn's attorneys present this Board with astonishing misstatements of the history of Farmingdale Yard. Submitted herewith is a historical summary of this facility and Pinelawn's adjacent cemetery, to the extent that the history of this Yard is important. Here it is sufficient to note that Pinelawn mistakenly asserts, "Initially the Farmingdale Track was used by Pinelawn as a turnaround for funeral processions." Amended Petition at 3, 17. There is no indication anywhere in the historical record that Pinelawn used LIRR properties or facilities for anything. LIRR operated the railroad and Pinelawn visitors and customers were public passengers using a public service provided by LIRR.

Pinelawn makes the further unsupported statement that, "[T]he Farmingdale Track ... was built by the LIRR-MTA as private track." Amended Petition at 4. There is no evidence to support that odd claim either. To the contrary, there is no question that LIRR leased the real estate beneath Farmingdale Yard in 1904 and 1905 and by 1916, its track charts (reproduced *supra* at 9) showed the current track configuration. There is no reason to think that

¹² Pinelawn argued extensively (and correctly) in its initial petition in this proceeding that Farmingdale Yard constituted excepted track as to which no abandonment authority is required.

LIRR would have leased the land and then somehow turned it over to some unidentified private entity to operate as private track. Pinelawn's counsel further asserts that, "The tracks were rarely used, if at all, beginning in the 1960s." Amended Petition at 3. That statement is simply false. Mr. John Curcio, Deputy General Counsel of LIRR with personal knowledge and records and documents of LIRR, described a century of continuous use of the Yard. Curcio V.S., ¶4; *see also* Lieberman V.S., ¶¶4, 15.

Pinelawn's attorneys continue writing fiction: "In addition, upon information and belief, the LIRR-MTA used the track for private purposes and did not offer public service on the track." Amended Petition at 17. First, "information and belief" is no substitute for evidence, and this Board cannot reach decisions based on counsel's conjecture. Second, if the LIRR operated the track, it wouldn't be "private track." Third, Farmingdale Yard was long used as a team track facility serving the shipping public directly;¹³ there is uncontroverted evidence that LIRR conducted intermodal loading operations for public shippers at the Yard, and uncontroverted evidence that LIRR conducted transloading operations at the Yard. Curcio V.S., ¶4; Lieberman V.S., ¶5. The only "evidence" cited by Pinelawn is the affidavit of Locke filed in the 2004 lease renewal case in which Locke said "Upon information and belief, from 1960 to 2004 when Coastal began its operations, there was little or no activity at the Rail Yard." Exhibit H to Amended Petition, p.23. This was not competent evidence when offered, and it has not improved with age. Locke effectively admits that he has no personal knowledge. There is no question that the Farmingdale Yard was used by LIRR to provide common carrier service and by no one else until LIRR transferred its freight franchise to NY&A. It was never a private track.

¹³ The affidavit of Pinelawn's own President acknowledges that the team tracks at Farmingdale Yard were used "by farmers shipping produce from Long Island to New York City." Ex. H to Amended Petition ¶ 22.

Aside from Pinelawn's fanciful history of the Yard, its legal argument that Farmingdale Yard today constitutes "private track" is baseless. Pinelawn seems to argue that any track that is not a mainline track must be a private track. "Private Track" is not a term defined in the ICCTA, but is a category of track whose construction is outside the Board's jurisdiction, because the operations conducted on those tracks do not involve common carrier service or common carrier resources. *New York Central R. Co. v. Southern Ry. Co.*, 226 F. Supp. 463 (N.D. Ill. 1964), *aff'd*, 338 F.2d 667 (7th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965), *reh'g denied*, 381 U.S. 907 (1965) ("*New York Central*"); *Devens Recycling Center, LLC -- Petition for Declaratory Order*, Finance Docket No. 34952 (STB served January 10, 2007) ("*Devens*"); *B. Willis, C.P.A., Inc. -- Petition for Declaratory Order*, Finance Docket No. 34013 (STB served October 3, 2001) ("*B. Willis*"), *reopening denied*, 6 S.T.B. 280 (2002), *aff'd sub nom. B. Willis, C.P.A., Inc. v. STB*, 51 Fed. Appx. 321 (D.C. Cir. 2002); *Public Service Co. of Colorado -- Construction Exemption -- Pueblo County, CO*, Finance Docket No. 33862 (STB served August 23, 2000) ("*PSC of Colorado*"); *see also Hanson Natural Resources Co. -- Non-Common Carrier Status -- Petition for Declaratory Order*, Finance Docket No. 32248 (ICC served December 5, 1994). Each of these cases dealt with whether construction authority was required for a new line of railroad constructed by a shipper, not whether common carrier possession of existing yard track was subject to the Board's jurisdiction.

In the *New York Central* case, Judge Hoffman extensively reviewed the text and legislative history of the Interstate Commerce Act and the Supreme Court's interpretation of the law to distinguish the type of "line extension" for which regulatory authority was required from the kind of private track construction that did not implicate the agency's jurisdiction:

I conclude from these decisions that a carrier need not apply for Commission certification under paragraph 18 for operating over private track to serve the track

owner, where the carrier does not engage in common carrier service over the track and where the carrier does not use its funds to maintain the track. ... But if the 'invading' carrier does not operate as a common carrier over the private track and does not use its funds to maintain the track or for the privilege of operating thereover, it is not operating any kind of road - branch, extension, spur or other - and does not fall within paragraph 18.

New York Central, 226 F. Supp. at 473 (emphasis added). The Seventh Circuit's affirmance expressly endorsed Judge Hoffman's reasoning and adopted his opinion. 338 F.2d 667. The Commission and the Board have consistently recognized that an exempt private track is neither used to provide common carrier service, nor maintained by a common carrier. *Devens* at 2; *B. Willis*, slip. op. at 2. While the Railroads recognize that there may be an issue about whether a portion of the Farmingdale Yard is currently being used to provide common carrier service,¹⁴ there is no question that the track continues today to be maintained by NY&A at NY&A's expense.¹⁵ *Lieberman V.S.*, ¶11. A track that is not only operated over by a common carrier but is maintained by a common carrier by definition cannot be a "private track" beyond this Board's jurisdiction.

In addition to NY&A maintenance, however, the track on both parcels underlying Farmingdale Yard is owned by a common carrier, not by an industry receiving rail service. The Farmingdale Yard track was installed, and is owned by, LIRR; it has been temporarily transferred to the use of NY&A until termination of the Transfer Agreement; and it was long ago placed on real estate that was leased for two centuries (as extended) to LIRR. Each of the Private

¹⁴ In the *Babylon* litigation, the Board never addressed the fact that scores of independent C&D generators unrelated to Coastal Distribution LLC bring their C&D debris to Farmingdale Yard for interstate railroad transportation. Without regard to the relationship between NY&A and Coastal, it would appear that common carrier service is being provided on the tracks at Farmingdale, if not by the transload operator, then necessarily by NY&A.

¹⁵ This Board has already recognized that NY&A maintains the track in the Farmingdale Yard. *Town of Babylon and Pinelawn Cemetery -- Petition for Declaratory Order*, Finance Docket No. 35057 (STB served Oct. 16, 2009) at 5.

Track cases cited above dealt with track that was owned by the shipper. The Farmingdale Yard cannot be considered Private Track because it is not owned or maintained by any shipper.¹⁶

Perhaps the most fundamental reason that Farmingdale Yard cannot be considered Private Track is that its current usage is temporary and both LIRR and NY&A insist they will use the Yard to provide common carrier service in the future (discussed more fully, *supra*). Particularly instructive in this regard is the Board's decision in *PSC of Colorado*. In that case, the Board considered a build-out by a utility company to reach a competitive carrier. Because the build-out required a forced crossing of the existing carrier, the Board faced the determinative question of whether the track was subject to the Board's jurisdiction. The Board found it had jurisdiction based solely on the utility's representation that it would serve other shippers on the line in the future should a demand for service arise, and thus it would be "assuming the responsibilities of a carrier." *PSC of Colorado* at 3. The Board explained how an electric utility would be "assuming the responsibilities of a carrier" this way:

PSCo states that it fully intends to be responsible for the maintenance and upkeep of the new line and will fulfill the obligation to provide service by arranging for UP to serve PSCo and other shippers who might request service, such as the C&W rail maintenance facility or other shippers who might locate along the line in the future.

PSC of Colorado at 3, n.6 (emphasis added). Thus, even if industry track is owned and maintained by the shipper and no other shipper is currently served by the tracks, the potential for future common carrier service preserves STB jurisdiction over the line and precludes "private track" status. See *B. Willis* at 3 ("Thus PSCo was holding out potential service to other shippers, and thus the track was not private track.") (emphasis added); cf. *Devens* at 3 ("[W]here as here, track is built to meet a shipper's own transportation needs and there is no holding out of the

¹⁶ The transload operator here has no legal interest in the real estate or the track and has no obligation to maintain the track. *Curcio V.S.*, ¶6; *Lieberman V.S.*, ¶¶2, 11.

possibility for any other shipper to obtain service, the track is private track.") (emphasis added). In this case, there is not only a possibility that other shippers will obtain service at Farmingdale Yard, but as demonstrated below, the Railroads are committed to ensuring future rail use.

There is no basis to conclude that Farmingdale Yard has ever been a "private track" beyond the reach of the STB's jurisdiction.

D. The Current Transload Operation Has Not Converted the Yard Into Private Track.

The thrust of Pinelawn's position appears to be that by contracting the current operations at the transload shed to a non-carrier, the Railroads have unwittingly converted excepted yard track into a private industry track such that any possibility of rail use now or in the future can be permanently foreclosed by state law. Pinelawn suggests that the well-established law recognizing the Board's preemptive jurisdiction over excepted track discussed above is inapplicable here because the current operator of a portion of the Farmingdale Yard, the portion where the transload shed is located, was found in the *Babylon* proceeding to not be under the control of a rail carrier. But that finding related to the particular, current contractual relationship with the operator within what is indisputably an LIRR/NY&A yard facility. Even more to the point, the *Babylon* findings related to a particular non-carrier operator performing transloading activities that themselves plainly met the statutory definition of "rail transportation." The Second Circuit Court of Appeals expressly observed: "[T]here is no question that the [transloading] activity at issue here constitutes 'transportation' within the meaning of the statute." 635 F.3d at 73. Transloading activity unquestionably constitutes rail transportation. See e.g., *New England Transrail, LLC -- Construction, Acquisition and Operation Exemption -- In Wilmington and Woburn, MA*, Finance Docket No. 34797 (STB served July 10, 2007) at 2 ("[T]he courts and the rail industry have consistently understood that transloading operations are part of rail

operations.).¹⁷ Further, this Board and the Second Circuit acknowledged that if NY&A itself operated the same facility in the same fashion, the operation would fall within the Board's preemptive jurisdiction. Allowing a non-carrier to conduct "transportation" within a rail yard does not and should not somehow remove the tracks and real estate within the yard itself from the Board's jurisdiction. *Cf., Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. -- Petition for Declaratory Order*, Finance Docket No. 34824 (STB served August 11, 2006) at 6 ("[W]hile a facility may be subject to our jurisdiction, not all activities within that facility necessarily fall under our jurisdiction."). This is particularly true given that apart from the loading activity, NY&A has concededly continued to conduct its own train operations daily in Farmingdale Yard -- pulling and spotting cars and maintaining the tracks -- and those operations are indisputably "transportation" that is being performed by a "rail carrier" on its own tracks. Neither this Board, nor the Second Circuit, have held or even intimated that the contractual relationship between NY&A and Coastal has somehow transmuted a century-old railroad yard into a private track beyond the protective preemption of the Board's jurisdiction.

To the contrary, the law is clear that even if no operations had been conducted at Farmingdale Yard in recent years, and even if no tracks were located on the property, federal preemption would act to preclude Pinelawn's state law eviction suit unless Pinelawn could affirmatively demonstrate that the property would not be needed for future rail use. The STB and courts have consistently held that a state law seizure of unused railroad right-of-way or property is preempted by ICCTA where such action would prevent or unreasonably interfere

¹⁷ We are thus perplexed by Pinelawn's insistence that "the Board made clear that it lacked jurisdiction both because Coastal was not a rail carrier and because the operations on the property [transloading] were not "transportation" under its jurisdictional statute." Amended Petition at 21 (emphasis in original). The second half of Pinelawn's statement plainly mischaracterizes both the agency and judicial holdings in *Babylon* and the agency's numerous, consistent pronouncements in various other proceedings.

with future railroad operations. In *City of Lincoln -- Petition for Declaratory Order*, Finance Docket No. 34425 (STB served August 12, 2004) ("*Lincoln I*"), *aff'd sub nom. City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005) ("*Lincoln II*"), a municipality sought to condemn twenty feet of a railroad's right-of-way in order to establish a recreational trail. The railroad objected, claiming that it used the right-of-way for various transportation-related purposes and might rebuild a spur track on the land. The STB explained that, "under 49 U.S.C. 10501(b) and relevant precedent, we must consider whether a proposed taking would prevent or unduly interfere with railroad operations and interstate commerce. If the taking would cause such undue interference, then it is federally preempted." *Lincoln I* at 3.

After reviewing the evidence, the STB concluded that the municipality "has not proffered convincing evidence that [railroad] can satisfy its present and future rail transportation needs using less than the full width of its right-of-way" *Lincoln I* at 5. In the absence of such a showing, the STB could not find that the proposed taking would not unduly interfere with interstate commerce. As a result, existing case law (*see, e.g., Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000)) compelled a finding of preemption against the state eminent domain law. On appeal, the Eighth Circuit affirmed, explicitly finding that:

[T]he Board can consider the railway's future plans as well as its current uses and make its own evaluation of how likely it is that the plans will come to fruition. Condemnation is a permanent action, and "it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses." *Midland Valley R.R. Co. v. Jarvis*, 29 F.2d 539, 541 (8th Cir. 1928).

Lincoln II, 414 F.3d at 862. Given the STB's "broad authority over the operation of railways and associated property," 414 F.3d at 861, the court agreed that an attempt to narrow the railroad's right-of-way through application of state law was preempted by ICCTA.

The STB revisited the issue in *City of Creede, CO -- Petition for Declaratory Order*, Finance Docket No. 34376 (STB served May 3, 2005), where a municipality sought to prevent the railroad's use of the outer 37.5 feet on either side of its 100-foot right-of-way.¹⁸ The railroad's single track was located on the middle 25 feet of the right-of-way. The STB again found that federal preemption extended to railroad property that did not currently have tracks:

Many railroad lines have a wider ROW [right-of-way] than might appear to be used, but that does not mean that all of the property is not needed for rail operations. As noted by [the railroad parties], extra width on the sides of the track allows room to maintain or upgrade the track, to provide access to the line, to serve as a safety buffer, and to ensure that sufficient space is left available for more tracks and other rail facilities to be added, as needed, as rail traffic changes and grows, among other uses. Thus, it cannot be said that property at the edge of a railroad's ROW is "not needed for railroad transportation" just because tracks or facilities are not physically located there now. *See Midland Valley R.R. v. Jarvis*, 29 F.2d 539, 541 (8th Cir. 1928).

. . . where, as here, the railroad opposes a plan to take part of a ROW and claims that the property is or will be needed for the conduct of rail operations, the burden is on the party seeking to take property away from the national transportation system to show that the entire ROW is not and will not be needed for rail purposes.

. . . in this case the City has not met its burden of showing that the full width of the ROW is not, and will not be, needed for rail use.

Creede at 6. *See also Soo Line R. Co. v. City of St. Paul*, 2010 WL 2540695 (D. Minn.) (unused portion of right-of-way is "property" falling within the definition of "transportation" in 49 U.S.C. § 10102(9)(A) and thus subject to preemption under Section 10501(b)); *Norfolk Southern Railway Company and The Alabama Great Southern Railroad Company -- Petition for Declaratory Order*, Finance Docket No. 35196 (STB served March 1, 2010) ("*NS/Birmingham*")

¹⁸ *Creede* involved the application of a zoning ordinance to the outer portions of the railroad right-of-way, while *Lincoln* involved application of an eminent domain statute. The effect in either case is the same as Pinelawn's attempted invocation of state real property law here -- to prevent the future use of the affected portion of the real estate for railroad purposes.

at 4 ("The fact that NS is not now actively operating trains on the Property does not mean that the property is not now, or may not later be, needed for railroad purposes . . .").¹⁹

If unused railroad property with no tracks in place can be subject to federal preemption under ICCTA, there is no rational basis to conclude that Farmingdale Yard -- which has active tracks continuously operated over by NY&A to switch hundreds of railcars and provide rail service moving over a quarter million tons each year-- is not subject to the same federal preemption regime simply because a transload operator on a portion of the site was deemed not to be a rail carrier.

Pinelawn's argument that the current agreement governing operation at the transload shed has caused a busy railroad yard to suddenly morph into "private track" is meritless.

E. The Railroads Have Not Abandoned Farmingdale Yard

Without regard to the creative but unavailing theory proposed by Pinelawn, its petition implicitly seeks involuntary "abandonment," per the ruling of the New York Appellate Division, of an active rail transportation facility. Although the court likely did not appreciate the nuanced distinction between regulated and excepted track, it clearly articulated that this Board must remove Farmingdale Yard from its preemptive jurisdiction before a court could entertain evicting the Railroads. We note that the preemption analysis that must govern this proceeding involving the excepted track within a rail yard is in many ways functionally equivalent to the adverse abandonment proceeding that would take place with respect to a regulated line of railroad. In adverse abandonments, the Board's role is to provide "a degree of protection against

¹⁹ See also 49 U.S.C. § 10102(6)(C), which expansively defines "railroad" to include "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation."

the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service." *Western Stock Show Assn. -- Aban. Exemption -- In Denver, CO*, 1 S.T.B. 113, 131 (1996); *Modern Handcraft, Inc. -- Abandonment*, 363 I.C.C. 969, 972 (1981). Adverse abandonments are generally denied if there is a potential for continued operations and the railroad has taken reasonable steps to attract traffic. *Id.* The non-carrier third-party has the burden of proof to show that an adverse abandonment would satisfy statutory public interest and convenience standards. *Chelsea Property Owners -- Aban. -- Consol. R. Corp.*, 8 I.C.C.2d 773, 778 (1992).

Here, the New York Appellate Division has properly indicated that Pinelawn cannot proceed to evict the Railroads unless the STB somehow releases its preemptive jurisdiction over the Yard. This case is therefore in an analogous posture as the Board faced in *NS/Birmingham, supra*, where a municipality sought to condemn allegedly excess-width right-of-way that was not currently under the tracks. This Board concluded that,

under section 10501(b), and relevant precedent, we must consider whether the taking proposed by the City would prevent or unduly interfere with railroad operation and interstate commerce. If the taking would cause such undue interference, then it is federally preempted.

NS/Birmingham at 3. The Board found that the proposed condemnation -- functionally equivalent to a private party evicting the railroad -- was federally preempted in part because the railroad intended future use for railroad purposes.²⁰

By the same reasoning, Pinelawn's taking of the 1904 Parcel would prevent or unduly interfere with railroad operation and interstate commerce because the Railroads intend the future use of Farmingdale Yard for railroad purposes, even if it turns out that they cannot

²⁰ The Board quoted the *City of Lincoln* decision, "condemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses," and noted, "Thus the Board's practice is to consider both current and future transportation plans in determining whether a railroad has proposed a bona fide rail operation." Finance Doc. No. 35196 (served Feb. 26, 2010).n.8 (emph. added).

continue the current transloading arrangement. Accordingly, this Board should advise the New York courts that Farmingdale Yard has not been and should not be abandoned.

1. The Railroads Intend to Continue Use of Farmingdale Yard For Railroad Purposes

Although there has been and will continue to be considerable legal wrangling over just what activities are permitted at Farmingdale Yard, the Railroads have no intention to abandon the yard. Ever since Pinelawn decided to repudiate its renewal of the 1904 Lease, the legal status of the ownership and operations at Farmingdale has been in controversy. After 6 years of federal litigation, the question of the Board's preemptive jurisdiction over the operation conducted by Coastal Distribution, LLC has been definitively resolved. However, there has been no resolution of the state law issues of (1) the validity and effect of Pinelawn's reinstatement and renewal of the 1904 Lease, (2) the authority of the Town of Babylon under New York's Public Authorities Law to regulate MTA property, or (3) the consequence of NY&A and Coastal Distribution having relied on Babylon's refusal to exercise jurisdiction over the construction of the transloading shed until it was virtually complete and then changing its position. NY&A and Coastal are reluctant to change their current agreement while state litigation continues – they already tried to do so once to meet the STB's apparent concerns and their bona fides have been roundly criticized for doing so. For that reason, NY&A and Coastal Distribution do not plan to change their arrangement pending resolution of the state issues. However, if the litigation in the state court is unavailing, some other rail activity will be conducted at Farmingdale Yard. In other words, if the state courts ultimately hold that Babylon has the power under state law to prohibit transloading of C&D at Farmingdale Yard under the current Transload Operating Agreement, the current arrangement will be changed and/or NY&A and/or LIRR will use the

yard for some other railroad purpose. As shown by the verified statements of Bruce Lieberman and John Curcio, both Railroads are committed to maintaining railroad use of Farmingdale Yard.

Just as important, the State of New York, through NYSDOT is committed to maintaining rail-truck transload facilities, including the Farmingdale Yard, as essential elements of its freight rail infrastructure. *Rondinaro V.S.*, ¶¶9-10. As the only railroad-controlled property east of New York City that is suitable for rail-truck transloading of bulk materials, on a 1,401 square mile island, whose 7,568,304 population depends on rail-truck transloading for any significant level of rail transportation, Farmingdale Yard is far too valuable for railroad purposes to be converted into cemetery plots, or condominiums, or whatever purpose Pinelawn harbors.

Once the parameters of permitted activities have been fully and finally litigated, the Railroads will make whatever adjustments may be required to continue the railroad use of Farmingdale Yard. Aside from Pinelawn's designs, no one expects the railroad use of Farmingdale Yard to end. Absent any intent to abandon this facility, there is no basis to conclude that Farmingdale Yard "has been abandoned."

2. A Private Taking of the Farmingdale Yard Would Fly in the Face of New York's Public Policy

This Board does not approve abandonments that are contrary to the public interest, *e.g.*, *Colorado v. United States*, 271 U.S. 153, 168 (1926), and the Board can readily ascertain that the public interest strongly requires the Farmingdale Yard to continue to be available for rail-truck transloading and other railroad purposes. Allowing Pinelawn to evict the Railroads would negate the consistent efforts by the State of New York to promote and protect this very facility, even as it is currently being operated. The New York State Department of Transportation feels strongly enough about the facility that the head of the Freight and Passenger Rail Bureau has provided a Verified Statement in this proceeding to explain the critical nature of

Farmingdale Yard as a truck-rail transload facility and to relate the State's repeated efforts to keep it in operation. The revitalization of the rail freight transload operations at the Yard by the NY&A was achieved with the full support and assistance of NYSDOT from the outset. *Rondinaro V.S.*, ¶12. NYSDOT explained its support for transloading activities and intervened with MTA/LIRR to resolve a dispute about use of the facility in 2002. *Rondinaro V.S.*, Ex. 5.

The track improvements, construction of the transload facility building and other improvements were funded privately in accordance with NYSDOT preference for "public private partnerships" – a policy established by NYSDOT upon recognition of the high capital cost for rail infrastructure improvements and the severe limitation of funding opportunities from state and federal budgets. See *Rondinaro V.S.*, ¶14. The Farmingdale Yard is one of the successes of New York State's initiative for the maintenance and improvement of its rail freight infrastructure through public-private partnerships. *Id.*

Once the *Babylon* litigation was underway, New York State repeatedly fought back efforts by local legislators to block operation of Farmingdale Yard. In 2006, Governor Pataki vetoed the first such attempt saying:

The City of New York ("City"), Department of State, DEC [Department of Environmental Conservation] and others oppose the bill for a number of reasons. First, the opponents of the bill are concerned that authorizing local governments to restrict railway-related solid waste facilities, including the Coastal facility, would result in a significant increase in the transport of solid waste by truck, which would adversely affect the environment. ... In particular, the City is concerned that the broad language of the bill would impede its ability to implement its proposed Solid Waste Management Plan....

Rondinaro V.S., Ex. 6. The next year, similar legislation was vetoed by the next Governor (Spitzer), who said,

[NYSDOT] indicates that closure of the rail facility in Babylon would result in an additional 39,000 loaded 20-ton trailer dump trucks – and an equal number of empty returning trucks – traveling on downstate roads and bridges each year,

which would have an adverse impact on traffic congestion, bridge wear and air quality.

Rondinaro V.S., Ex. 7. In 2008 a third Governor (Patterson) also vetoed similar legislation, explaining, *inter alia*, "rail transport must be preserved as a viable alternative to truck traffic on local community roads." Rondinaro V.S., Ex. 8.

The State of New York continues to support the transload operations at Farmingdale Yard. The "*New York State Rail Plan 2009- Strategies for a New Age*" ("NYSRP") specifically identifies the lack of freight rail terminals in the greater New York City area, including Long Island, as a serious limitation on rail service²¹ and notes that "there are no modern truck-rail intermodal freight terminals on Long Island to handle this significant rail freight market segment."²² Similarly, a private study of freight rail yards available to support rail traffic east of the Hudson River concluded that the limited availability of yards, rail-truck transfer facilities and warehouse facilities is one of the most significant constraints to rail market share east of the Hudson. Rondinaro V.S., ¶11.²³

A recent study of the freight rail system on Long Island for NYSDOT noted the current and future demand for bulk rail transload facilities. It concluded that,

Given the shortage of available rail-truck transfer facilities on the [Long] Island, which prevents existing latent demand for rail-freight service from being met -- and hence prevents additional diversion from trucking -- no action should be taken that would foreclose the development of any potentially feasible truck-rail yards.²⁴

²¹ NYSRP, 2009 at 42-43 attached as Exhibit 1 to Rondinaro V.S.

²² *Id.* at 43.

²³ Metropolitan Transp. Council, Rail Freight Yard Requirements Land Assessment for East of Hudson Area, March 2003, Rondinaro V.S., Ex. 2.

²⁴ Paaswell and Eickemeyer, Consideration of Potential Intermodal sites for Long Island, CUNY Institute for Urban Systems. (June 9, 2011) at 4, Exhibit 3 to Rondinaro V.S.

The need is so strong that consideration is being given to a controversial proposal to convert part of the 1,900 acres of the former Pilgrim State Hospital grounds into a transload facility.²⁵ The fact that such a proposal is even being considered is strong evidence of the need for more, not less, transload facilities. The need is so great that NYSDOT even filed comments with this Board in support of the goal (if not the means taken) of US Rail Corporation in its proposed Brookhaven Rail Terminal. *Rondinaro V.S.*, Ex. 4.

After reviewing this situation and the consistent position of the State of New York concerning rail-truck transloading facilities, especially on Long Island, the NYSDOT now advises this Board that,

NYSDOT believes that the New York & Atlantic Railway Company's rejuvenation of the 4.9 acres of wye, yard and rail-truck transfer capacity at the Farmingdale Yard supports the key components of the State's freight rail transportation plan, policies and initiatives in that (a) an important rail transportation property has been retained and is actively operating as a component of both the State and national rail transportation system; (b) private capital has been invested to improve Long Island's rail infrastructure in furtherance of the State's policy preference for financing freight rail investments through public-private partnerships; and (c) the facility has increased the freight tonnage transported by rail from Long Island, removing more than 190,000 trucks from State roadways since 2004, while increasing energy efficiency and lowering carbon emissions.

Based on the foregoing, NYSDOT endorses the position taken by the Long Island Rail Road, the New York & Atlantic Railway, and Coastal Distribution LLC in opposition to the petition of Pinelawn Cemetery presently before the Surface Transportation Board.

Rondinaro V.S., ¶¶14-15.

Before this Board could approve any "abandonment" of rail infrastructure, particularly where that "abandonment" is involuntary, adverse and amounts to a taking of property unquestionably being used in "transportation"(if not currently by a "carrier"), this Board

²⁵ *Id.* at 28.

would need to make a finding that such abandonment is in the public interest. The State of New York and others have consistently found instead that the public interest demands the continued availability of Farmingdale Yard for railroad transloading operations.

Even if the contract between NY&A and Coastal places Coastal's current operation beyond the STB's jurisdiction, NY&A actively operates every week night on and over the tracks at Farmingdale, serving Coastal and/or its customers and moving over 5,500 tons of freight each week. Removing the throat of the Yard from the railroad system, as sought by Pinelawn, would deprive that traffic of railroad transportation. The Rail Transportation Policy of the U.S. Government includes, "(4) to ensure the development and continuation of a sound rail transportation system ... to meet the needs of the public...." 49 U.S.C. § 10101. Taking the real estate from a busy rail terminal for use as a cemetery or other non-rail purpose cannot be consistent with the Rail Transportation Policy.

To a far greater degree than the unused right of way involved in *Lincoln* and *Creede, supra*, the continuing need for rail service at Farmingdale Yard is recognized and demonstrated by NY&A, LIRR, shippers and the NYSDOT. The continuing importance of Farmingdale Yard as a critical piece of rail infrastructure on Long Island confirms that efforts under state law to evict NY&A and LIRR from the Yard are inconsistent with the public interest in maintaining a national railroad system and should continue to be protected by the preemptive shield that accompanies the STB's exclusive jurisdiction over these kinds of ancillary but critical railroad facilities.

3. The Ramifications of Pinelawn's Position Are Severe

The impact of ruling in favor of Pinelawn here would extend far beyond a small yard on Long Island. Railroads have historically leased or licensed extra-width right of way,

unused yards and tracks, and other non-essential real estate on an interim basis to provide a source of non-operating revenue. For example, many railroads lease excess right of way to third-parties, often shippers. Such property is leased instead of being sold so it can be returned to active railroad use in the future should traffic patterns change and the property become necessary for operating purposes. Railroads frequently lease or license the use of yard, side and spur tracks to third parties who conduct their own transloading businesses using those tracks, but because the tracks and the property beneath them are still owned by the railroad, the property can be returned to active railroad service. Similarly, many railroads lease their tracks to third parties, to store railcars temporarily. In all these situations, the railroad increases the utility and value of portions of its real estate that are not currently needed for rail operations, while retaining the flexibility to regain possession if changing traffic patterns require returning the property to railroad operating use. *Lieberman V.S.*, ¶ 18.

It is also common in the railroad industry for carriers to contract with third parties to provide various operating support functions on railroad property. For example, railroads have frequently contracted the operation of intermodal yards to third party operators. Under such contracts, typically a single operator will have the exclusive right and obligation to conduct lift operations at a particular yard. Similarly, railroads often contract the operation of automobile loading/unloading yards to a single operator at a particular railroad facility. Likewise, railroads sometimes contract mechanical repairs, car cleaning, locomotive fueling and other support functions. In those situations, a third party is given temporary possession of a railroad facility, and the railroad obtains needed services on its own premises from a non-carrier third party in a manner that preserve's the railroad's flexibility to take over the service with its own employees or to contract with a different third party. *Lieberman V.S.*, ¶ 19.

In each of the situations mentioned above and many other variations, the railroad grants temporary possession of railroad real estate to a non-carrier third party. Such arrangements benefit the railroads by either providing non-operating revenue or providing flexible alternatives for providing needed services. The legal position advocated by Pinelawn in this proceeding would jeopardize these common and beneficial arrangements in the railroad industry.

Rail-owned property is often valuable for non-rail purposes, but the preemptive jurisdiction of the Surface Transportation Board protects such property from taking under state laws and procedures for non-rail purposes. In granting possession of their real estate to such non-carriers, railroads have not imagined that they could be jeopardizing federal preemption of state claims and putting at risk their future rights to use the property for railroad purposes. If the Board's preemptive jurisdiction over railroad real estate is lost by virtue of its temporary use by a non-carrier, then railroads will be extremely reluctant to lease, license or otherwise allow non-carriers to possess railroad property, even for a short time. This would deprive the railroad industry of essential flexibility of operations and of valuable revenue streams that support their common carrier service while preserving irreplaceable infrastructure for future operating use. Holding for Pinelawn in this case would unjustifiably deprive railroads of operating flexibility and a revenue stream from temporary lease or licensing of real estate.

III. THE BOARD'S JURISDICTION DOES NOT PRECLUDE STATE COURT ADJUDICATION OF STATE LAW ISSUES

The Board, of course, would not undertake to interpret the 1904 Lease nor adjudicate the parties' state law contractual dispute regarding the renewal of that agreement. *Cf. City of Peoria and Village of Peoria Heights -- Adverse Discontinuance -- Pioneer Industrial Railway Company*, Docket No. AB-878 (STB served August 10, 2005) at 6. The Railroads do

not object to a Board order clarifying that the state court is free to resolve state law issues concerning the validity and effect of the 1904 Lease renewal, but that the court is without the authority to evict the Railroads from Farmingdale Yard, impose injunctive relief or assess penalties for trespass or negligent misrepresentation. See *Lange* at 4; see also *Pinelawn Cemetery v. Coastal Distribution, LLC*, 906 N.Y.S.2d at 567 (outlining Pinelawn causes of action); *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134 (1946). As the Board has previously noted, should the state court find that the 1904 Lease has not been properly renewed, Pinelawn's remedy would presumably be an inverse condemnation remedy that it could pursue under state law. *Lange* at 4.

CONCLUSION

The Railroads respectfully request that the Board dismiss Pinelawn's petition as moot because the federal preemption issue raised in the state court proceeding has been definitively resolved, and resolution of any further issue of federal preemption of possible remedies in the state court proceeding is premature and speculative. Alternatively, if the Board addresses the merits of Pinelawn's amended petition, Railroads request the Board find: 1) that institution of a declaratory order proceeding is not necessary to address Pinelawn's petition; 2) that the Railroads have not abandoned Farmingdale Yard so Pinelawn's state law action, insofar as it seeks to evict NY&A and LIRR from Farmingdale Yard, is preempted by 49 U.S.C. § 10501(b); and 3) that the New York state courts may proceed to adjudicate the parties' contractual lease dispute and, if decided in Pinelawn's favor, impose such remedies under state law as do not conflict with the STB's exclusive jurisdiction over rail transportation and continued rail use of the Farmingdale Yard.

Respectfully submitted,

By: 

Ronald A. Lane

Thomas J. Litwiler

Michael J. Barron, Jr.

Fletcher & Sippel LLC

29 North Wacker Drive

Suite 920

Chicago, Illinois 60606-2832

(312) 252-1500

**ATTORNEYS FOR NEW YORK & ATLANTIC
RAILWAY COMPANY**

Dated: July 27, 2011

Verified Statement of Bruce A. Lieberman

1. I am Chairman of the New York and Atlantic Railway Company ("NY&A"), and I have held that position since 1998. I have knowledge of the following facts.

2. In the early 1990s, New York Governor George Pataki determined that vehicular congestion on Long Island could be alleviated by encouraging freight rail transportation over long-distance trucking. Because the LIRR's primary focus had become commuter service, the State of New York decided to privatize LIRR's freight service in the hopes of increasing freight rail use and subsidizing the LIRR commuter operations. LIRR's freight franchise was put out to bid in 1996 and was thereafter privatized when LIRR entered into a Transfer Agreement with NY&A ("Transfer Agreement"). The Transfer Agreement conveyed to the NY&A, for a term of 20 years (with the right to renew for another 10 years if certain traffic volume and safety thresholds were met) the exclusive right to operate LIRR's freight franchise, the exclusive right to utilize certain property used solely for freight service, and the joint right to operate over certain LIRR mainline tracks. The STB authorized the transaction on January 10, 1997. STB Finance Docket No. 33300. One of the freight properties leased to NY&A was the Farmingdale Yard. NY&A has the right to occupy, operate and use the Yard for the duration of the Transfer Agreement and to fulfill LIRR's common carrier obligations. Like all the improvements on LIRR's freight property, the rail, ties, switches, scales, buildings, fixtures and all other improvements installed on the real property of the Farmingdale Yard are owned by LIRR and available for use by the NY&A during the term of the Transfer Agreement. At the expiration of the Transfer Agreement, LIRR will resume possession of its freight property and will itself discharge its freight obligations unless it renews the contract with NY&A or contracts with another operator.

3. Because there are no modern industrial parks or intermodal yards on Long Island, increasing freight rail service is largely dependent on transloading, i.e. transferring freight between rail cars and trucks at transload facilities. Accordingly, to achieve New York's policy goal of reducing highway congestion on Long Island, NY&A has attempted to shift long-distance truck shipments to local moves to and from its rail facilities, where the freight can be loaded and unloaded to and from railcars. Most of the rail freight business developed by NY&A since 1997 has been moved via such transload facilities.

4. On Long Island commercial and residential construction is the principal industry that can use rail freight transportation. Because it can use rail transportation both inbound and outbound, the construction industry constituted one of the most promising areas for NYA growth. However, construction materials are heavy and bulky, so they require relatively large parcels to load and unload railcars in economic quantities.

5. The Farmingdale Yard is the only LIRR freight property east of New York City that is large enough to accommodate significant transload operations for bulk materials. It is also well suited for rail transload activities because it is located on a busy highway in an industrial area, backing up to a cemetery and at the end of a runway for a regional airport. No residences are located within a half mile of the railroad yard. At the time NY&A took over freight service, the Farmingdale Yard was being used to load highway containers on and off railroad flatcars, to load and unload large pieces of freight, and to gather the waste generated by LIRR's passenger operations and transfer it to trucks for disposal. The Yard's wye track was also used to turn cars and locomotives to operate in the opposite direction.

6. When NY&A began operations, it quickly realized that it needed an experienced transload operator to credibly assure customers that rail transportation was a realistic

alternative to trucks. NY&A turned to a subsidiary of CSX Transportation ("CSXT") in 1999 to market rail service through transloading at Farmingdale and conduct transloading operations for NY&A. However, CSXT was unable to produce any measurable new rail traffic.

7. In 2002, NY&A entered into an agreement with Coastal Distribution, LLC ("Coastal") under which Coastal would conduct transload operations at the Yard. NY&A and Coastal determined that an enclosed transload facility building covering part of the existing tracks would be necessary to properly transfer bulk materials freight.

8. In the late summer of 2003, NY&A became aware that the LIRR did not own the Farmingdale Yard, but had leased it from Pinelawn, and that LIRR had not timely renewed the lease for the 1904 Parcel, a critical portion of the yard containing the connection to the LIRR mainline. Coastal and NY&A agreed that any further construction or development activity could only occur after it was certain that LIRR and NY&A would be able to continue their use and occupancy of the Farmingdale Yard for rail transportation.

9. On October 23, 2003, the Executive Vice President of Pinelawn attended a meeting held in the construction trailer at the Farmingdale Yard, at which time he delivered a three sentence letter agreement that had been prepared by the MTA and certified mailed to Pinelawn's attorney. The letter agreement was signed by Stephen Locke, the President of Pinelawn, and in it Pinelawn and LIRR explicitly agreed to reinstate and renew the lease for the 1904 Parcel and to renew the lease for 1905 Parcel, extending them to 2102 and 2103, respectively. The letter agreement provides in part as follows:

We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below

Next to his signature, Mr. Locke wrote, in his own hand, "This concurrence refers to Aug. 30 1904 lease." A copy of the agreement is attached as Attachment A.

10. On January 15, 2004 Pinelawn's attorney informed NY&A and Coastal that Pinelawn had not and would not renew the 1904 Lease, and demanded that NY&A and Coastal remove all structures from that portion of the Yard. Since the 1904 Parcel includes the only access to the LIRR mainline, the portion of the Yard on the 1905 Parcel would be useless for rail transportation purposes without use of the 1904 Parcel as well.

11. The Farmingdale Yard has become NY&A's and Long Island's largest single generator of rail freight traffic. Today, NY&A spots 9 to 12 empty cars in the Yard every week night, and pulls a like number of loads to interchange with CSXT at Fresh Pond, New York. As required by the current Transload Operations agreement, NY&A performs all track maintenance at Farmingdale Yard. NY&A maintenance crews check the track and roadbed weekly, maintaining the facility for regular use. As summarized in the table below, over 20,000 gondola cars of C&D debris have been loaded and shipped by rail since the summer of 2004. Each carload has a capacity equivalent to five 20 ton tractor trailers, and for every loaded truck driving New York roadways, an empty must return. The transload operation at the Farmingdale Yard has already removed in excess of 190,000 truck trips from the region's highways since it opened.

Farmingdale Yard Rail Shipments

Year	Railcars Shipped	Freight Tons Shipped	Trucks Removed From Roadways
2004	785	74,575	7,458
2005	2,326	220,970	22,097
2006	3,426	325,470	32,547
2007	3,682	349,790	34,979
2008	3,691	350,645	35,065
2009	2,574	244,530	24,453
2010	3,144	298,680	29,868

Jan - June 2011	1,678	159,410	15,941
Total	21,306	2,024,070	202,407

Moreover, the long, drawn-out litigation over the applicability of Babylon's zoning ordinance at this Yard has had an unmistakable dampening effect on shipper's willingness to use rail transportation. Shippers have expressed reluctance to jeopardize their commercial relationships with trucking firms while the long-term viability of the transload operation is unresolved in the courts. However, the railroads are confident that once that cloud is lifted, volumes will increase substantially.

12. NY&A and Coastal have assiduously assured that the Farmingdale facility is operated in a clean, safe and healthy manner. NY&A and Coastal have demanded, since C&D transloading operations commenced in 2004, that the Farmingdale facility be in complete compliance with all state and federal environmental laws. The facility has been issued, and maintains in good standing, a New York State Department of Environmental Conservation Solid Waste Rail Transfer Facility Permit (1-4720-03667/00001). We have never received any complaints about the operation of the facility, including any complaints about noise, odor or sanitary conditions.

13. The LIRR supports the operation at Farmingdale because it is an efficient facility to realize the freight potential of its rail system. LIRR is a direct beneficiary of every freight carload that moves in or out of the Farmingdale Yard. To obtain and retain the rights under the Transfer Agreement, NY&A paid an initial franchise fee of more than a million dollars and continues to pay an annual fee of hundreds of thousands of dollars. In addition NY&A pays LIRR a license fee for every loaded car on the system and a trackage rights fee that contributes to track maintenance for every car-mile traveled over the jointly-used tracks. Not only does LIRR

receive a financial subsidy from the freight car movements, but it is also temporarily relieved of its obligation to provide freight service, so it can focus exclusively on its commuter rail service.

14. The New York State Department of Transportation supports the operation at Farmingdale because the Yard's location and configuration make it a key facility to achieve the State's long-term transportation goal of increasing freight rail service on Long Island. In addition the New York State Department of Environmental Conservation which has issued a permit for the current operation of the facility supports that use of Farmingdale Yard because it helps achieve the state's goal of shifting transportation of solid waste in the region from highway to rail. As a consequence of New York state's support of this facility, three successive Governors vetoed attempts by Babylon to amend state law to allow it to enforce its zoning ordinance against this facility.

15. NY&A is committed to the continued use of Farmingdale Yard for railroad transportation purposes. The current arrangement whereby Coastal conducts transloading operations focused on C&D debris remains subject to unresolved litigation. Although the Second Circuit has resolved the question of federal preemption of Babylon's zoning ordinance under ICCTA, there remain substantial unresolved state law issues which are still pending in court and which cannot move forward until the STB rules in this proceeding.

16. NY&A and Coastal have so far refrained from changing their current operating arrangements during pendency of the state court proceedings, because we and the LIRR believe that New York state law bars application of Babylon's zoning ordinance at Farmingdale Yard. However, if the New York state courts ultimately decide that Babylon's zoning law does preclude the transloading of C&D debris at the transload shed in Farmingdale Yard, NY&A will definitely not abandon Farmingdale Yard. Prior to its use for C&D

transloading, NY&A transloaded a variety of other products at Farmingdale Yard, including aggregate, lumber, particle board and plastic pellets, and NY&A could resume focusing on such traffic. Of course, NY&A could resume direct operation of the facility itself, or restructure its operating arrangement to bring the current transload operation within the Board's jurisdiction or within the preemption of New York's state law. Even if NY&A conducted no transloading activity at Farmingdale, it would utilize the 1,400 feet of dual spur track for switching or car storage or some other railroad purposes. The Farmingdale Yard is far too valuable as a railroad facility to simply abandon its use for railroad purposes, and NY&A will take whatever action is necessary to avoid Pinelawn taking the property for cemetery plots, hotels, condominiums or whatever presumably higher-return use it has in mind.

17. However the dispute between the railroads and the Town of Babylon over transloading C&D debris is resolved, there is no justification whatever for Pinelawn's opportunism to deprive the railroads and the railroad shippers of Long Island of a valuable piece of railroad infrastructure that is critical to the continued viability of railroad transportation on Long Island.

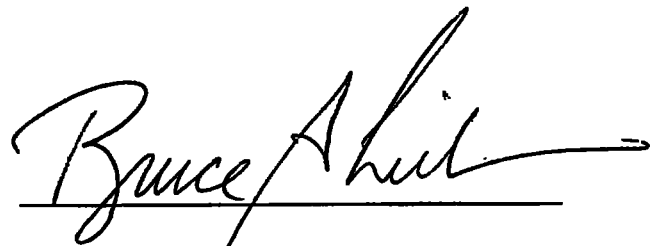
18. Many railroads lease right of way to third-parties, often shippers. Such property is leased instead of being sold so it can be returned to the railroad should future should traffic patterns change. Railroads frequently lease or license the use of yard, side and spur tracks to third parties who conduct their own transloading businesses using those tracks, but because the tracks and the property beneath them are still owned by the railroad, the property can be returned to active railroad service. Similarly, many railroads lease their tracks to third parties, to store railcars temporarily. In all these situations, the railroad increases the utility and value of portions of its real estate that are not currently needed for rail operations, while retaining the

flexibility to regain possession if changing traffic patterns require returning the property to the railroad.

19. It is also common in the railroad industry for carriers to contract with third parties to provide various operating support functions on railroad property. For example, railroads have frequently contracted the operation of intermodal yards to third party operators. Under such contracts, typically a single operator will have the exclusive right and obligation to conduct lift operations at a particular yard. Similarly, railroads often contract the operation of automobile loading/unloading yards to a single operator at a particular railroad facility. Likewise, railroads sometimes contract mechanical repairs, car cleaning, locomotive fueling and other support functions. In those situations, a third party is given temporary possession of a railroad facility, and the railroad obtains needed services on its own premises from a non-carrier third party in a manner that preserve's the railroad's flexibility to take over the service with its own employees or to contract with a different third party.

Affirmation

I swear that I have personal knowledge of the foregoing facts and that they are true and correct to the best of my knowledge and belief.



Bruce A. Lieberman

State of New York)
) ss
County of New York)

July 26, 2011



RAM SASSOON
NOTARY PUBLIC-STATE OF NEW YORK
No. 01SA6134237
Qualified in Queens County
My Commission Expires September 26, 2013

347 Madison Avenue
New York, NY 10017-3779
212 678-7000 Tel

**Metropolitan Transportation Authority**

State of New York

October 17, 2003

Via: Certified Mail - Return Receipt Requested
Fax: 212-704-6288

Jonathan S. Gaynin
Jenkins & Gilchrist Parker Chapin LLP
405 Lexington Avenue
New York, NY 10174

RE: Land Lease Agreements Dated November 1, 1905, and August 30, 1904 Between The Pinelawn Cemetery and The Long Island Railroad Company (LIRR) for Use as a Railroad Yard and Auxiliary Services of the Railroad.

Dear Mr. Gaynin:

On behalf of LIRR we are hereby exercising it's option to renew the above referenced lease dated November 1, 1905 for an additional ninety-nine (99) years thereby extending it through October 31, 2103.

We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below, and return one original copy of this letter to my attention.

If you have any questions please call Mimi Fuhrman, of my staff, at (212) 878 - 7262.

Sincerely,

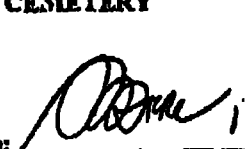
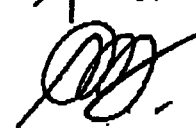
PINELAWN CEMETERY


Roco Kravitz
Director of Real Estate

Concurrence:

Date

Cc: S. Antman, F. Krebs.
C. Malocchi, K. Rydzewski, Chron/fic

 President
10/23/03
This concurrence refers to Aug 30
1904 lease. 

The agencies of the MTA: Peter S. Kalikow, Chairman

MTA New York City Transit MTA Long Island Rail Road MTA Lower Island Bus MTA Adams Morgan Railroad MTA ...

Oct 23 03 12:11p

Jenkins & Gilchrist

(212) 704-8209

347 Madison Avenue
New York, NY 10017-3739
212 678-7000 Tel



Metropolitan Transportation Authority

State of New York

October 17, 2003

Via: Certified Mail - Return Receipt Requested
Fax: 212-704-6288

Jonathan S. Gaynin
Jenkins & Gilchrist Parker Chapin LLP
405 Lexington Avenue
New York, NY 10174

RE: Land Lease Agreements Dated November 1, 1905, and August 30, 1904 Between The Pinelawn Cemetery and The Long Island Railroad Company (LIRR) for Use as a Railroad Yard and Auxiliary Services of the Railroad.

Dear Mr. Gaynin:

On behalf of LIRR we are hereby exercising it's option to renew the above referenced lease dated November 1, 1905 for an additional ninety-nine (99) years thereby extending it through October 31, 2103.

We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below, and return one original copy of this letter to my attention.

If you have any questions please call Mimi Fuhrman, of my staff, at (212) 878 - 7262.

Sincerely,

PINELAWN CEMETERY



Roco Krsulic
Director of Real Estate

Concurrence: 

Date

10/23/03

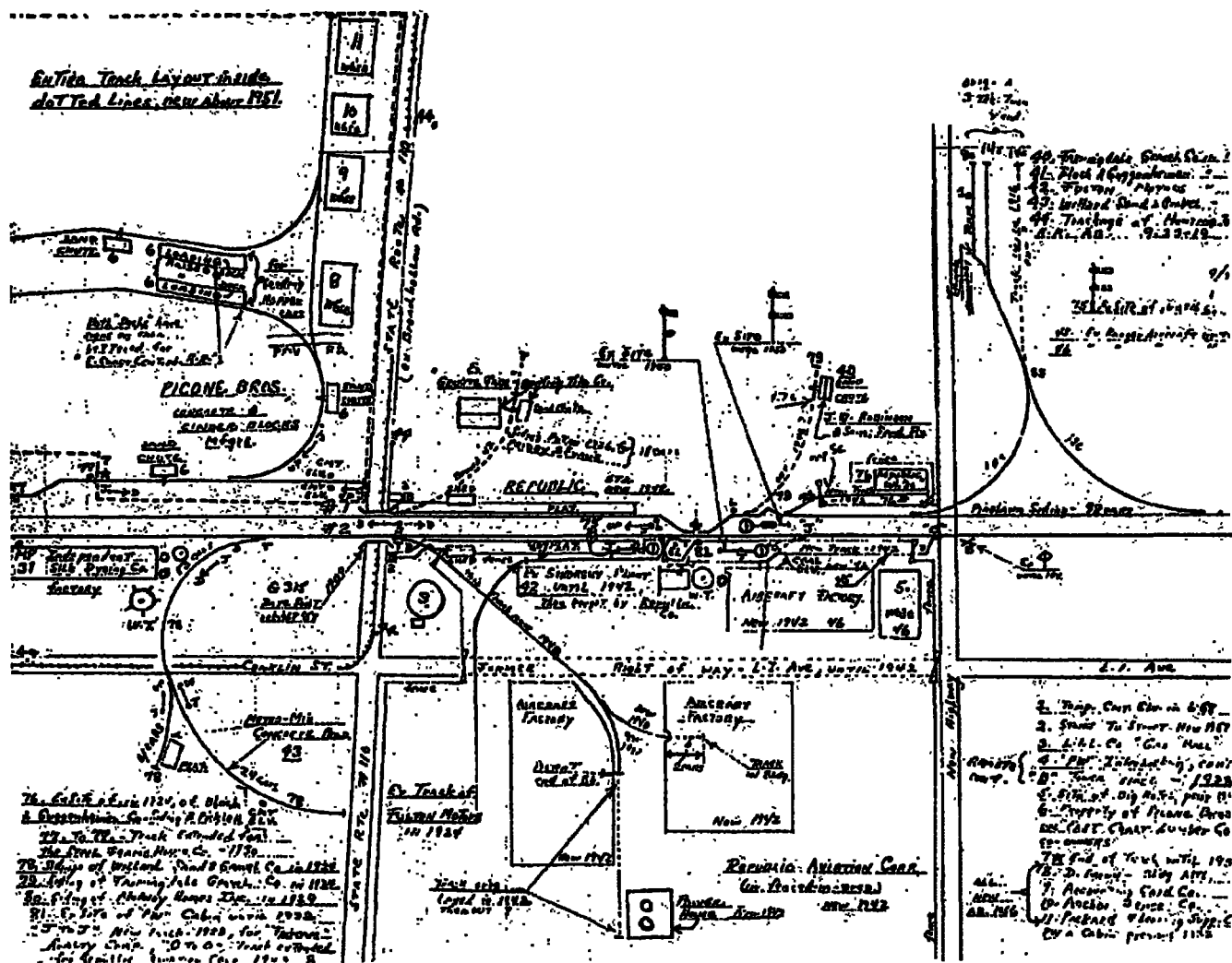
Cc: S. Antman, F. Krebs.
C. Malocchi, K. Rydzewski, Chronoff

This concurrence refers to Aug 30
1904 lease. 

The agencies of the MTA, Peter S. Kalikow, Chairman

MTA New York City Transit MTA Long Island Rail Road MTA Lower Island Bus MTA Staten Island Railroad

Historical Appendix



Emery Map 31-32, Republic - Route 110
 Farmingdale, June 1958



Farmingdale Yard Aerial
April 7, 1994



Farmingdale Yard Aerial
March 31, 2001

3.0 LONG TERM EXPORT PROGRAM

3.1 Introduction

This section describes the Administration's proposed Long Term Export Program to replace the Interim Export contracts. It provides the background and context for the program, identifies the facilities and services that are part of the Proposed Actions, lists Milestones related to its implementation, and summarizes important features of the operations of these facilities and of other Existing Programs.

3.2 Background

In July 2002, Mayor Bloomberg outlined a new approach to the City's Long Term Export Program and directed the DSNY to develop and implement an MTS Conversion Program. Subsequently, the Mayor initiated efforts to explore and pursue an array of Alternatives to Converted MTSs that might reduce the cost and/or accelerate the Program's implementation. Consistent with the Mayor's direction, the following actions were taken to define and advance the Long Term Export Program:

- Issuance of three procurements to identify private waste transfer facilities in the Bronx, Queens and Brooklyn (BQB RFPs)¹ that could serve as Alternatives to South Bronx and Greenpoint Converted MTSs, receipt of proposals and selection of vendors for contract negotiations;
- Initiation of discussions with the Port Authority on a long-term government-to-government agreement for the utilization of the excess disposal capacity available at the Essex County Resource Recovery Facility in Newark, New Jersey (Essex County RRF);
- Development of plans for the conversion of the MTSs into containerization facilities to 90% design completion and preparation of draft applications for land use approvals and regulatory permits for the Converted MTSs;

¹ Request for Proposals to Receive, Transfer, Transport and Dispose of Department of Sanitation-managed Waste from Brooklyn Formerly Delivered to the Greenpoint MTS; (ii) Request for Proposals to Receive, Transfer, Transport and Dispose of Department of Sanitation-managed Waste from Queens Formerly Delivered to the Greenpoint MTS; and (iii) Request for Proposals to Receive, Transfer, Transport and Dispose of Department of Sanitation-managed Waste from the Bronx.

- Issuance of a procurement to solicit vendor proposals to receive, transport and dispose of the solid waste containerized at Converted MTSs, receipt of proposals and vendors selected for contract negotiations;
- Construction of the Staten Island truck-to-container-to-rail transfer station,² now at 100% completion and via a procurement, the award of a 20-year service agreement to receive, transport and dispose of the solid waste to be containerized at the Staten Island transfer facility;
- Issuance of a Request For Expressions of Interest (RFEI) to investigate the availability of New York State disposal capacity for DSNY-managed Waste; and
- Issuance of an FEIS, to support the SWMP.

3.3 Proposed Actions – Long Term Export Facilities and Contracts

The Proposed Action for Long Term Export has the following specific elements.

- For the Bronx wasteshed, CDs 1 through 12, enter into a long-term contract with one or both of two private waste companies for truck-to-rail disposal of all or a portion of the Bronx waste;
- For the Brooklyn wasteshed formerly served by the Greenpoint MTS, enter into a long-term contract with one or two private waste companies for truck-to-rail or truck-to-barge disposal of all or a portion of the DSNY-managed Waste from Brooklyn CDs 1, 3, 4 and 5;
- For the Brooklyn wasteshed formerly served by the Hamilton Avenue MTS, develop a City-owned Converted MTS on the same site, where DSNY-managed Waste from Brooklyn CDs 2, 6, 7, 8, 9, 10, 14, 16, 17 and 18 will be received and containerized;
- For the Brooklyn wasteshed formerly served by the Southwest Brooklyn MTS, develop a City-owned Converted MTS on the same site, where DSNY-managed Waste from Brooklyn CDs 11, 12, 13 and 15 will be received and containerized;
- For the wasteshed inclusive of Manhattan CDs 1, 2, 3, 4, 7, 9, 10 and 12, enter into a long-term service agreement with the Essex County RRF in Newark, New Jersey to receive and process DSNY-managed Waste delivered in City collection vehicles;
- For the Manhattan wasteshed formerly served by the East 91st Street MTS, develop a City-owned Converted MTS on the same site, where DSNY-managed Waste from Manhattan CDs 5, 6, 8, and 11 will be received and containerized;

² Approved in the 2000 SWMP Modification; the facility is fully permitted.

- For the Queens wasteshed formerly served by the Greenpoint MTS, enter into a long-term contract with a private transfer station for truck-to-rail or truck-to-barge disposal of all of the DSNY-managed Waste from Queens CDs 1 through 6;
- For the Queens wasteshed formerly served by the North Shore MTS, develop a City-owned Converted MTS on the same site, where DSNY-managed Waste from Queens CDs 7 through 14 will be received and containerized; and
- For the four wastesheds served by Converted MTSs, enter into 20-year service agreements with one or more waste management companies for transport of containerized waste by barge directly from an MTS to disposal facilities or to intermodal facilities for transloading to railcars or a larger barge, and for disposal at an appropriately permitted out-of-City facility.

Figure 3.3-1, Locations of SWMP Long Term Export Facilities and Wastesheds Served, identifies the boroughs and CDs that would be assigned to specific facilities.

Table 3.3-1 lists the potential long-term export facilities proposed in the SWMP. In the Bronx and Brooklyn CDs 1, 3, 4 and 5, noted in Table 3.3-1, the decision as to whether DSNY contracts for export of all or a portion of the DSNY-managed Waste generated in these wastesheds with either of two potential transfer stations is being determined during ongoing negotiations with the proposing companies.

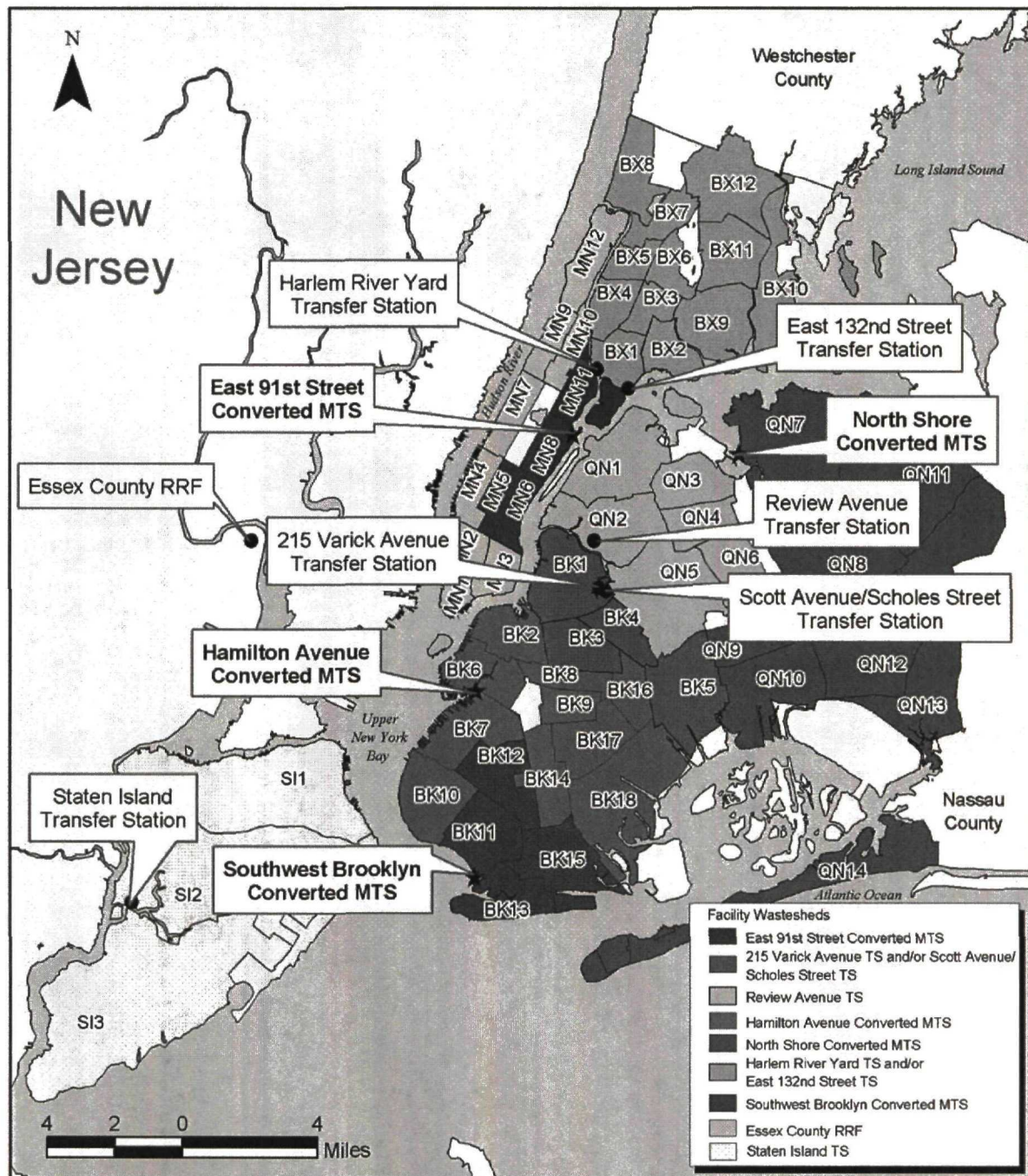
3.3.1 Formulation and Advantages of the Long Term Export Program

Currently, Interim Export contracts provide for disposal of all DSNY-managed Waste. The principal features of Interim Export³ are:

- DSNY contracts with 21 private transfer stations (located both within and outside the City) or out-of-City disposal facilities, to provide sufficient capacity to dispose of approximately 12,500 tpd on an average daily basis;
- 48% of DSNY-managed Waste is moved to out-of-City disposal sites by transfer trailers;

³ This information reflects the status of Interim Export in FY 2004.

Figure 3.3-1
Locations of SWMP Long Term Export Facilities and Wastesheds



**Table 3.3-1
Proposed SWMP Long Term Export Facilities and Potential Contractors**

Facility Type	Owner, Facility Name, and Address	Community District	Wasteshed Served – Community Districts
Converted MTS ⁽¹⁾	DSNY Hamilton Avenue Converted MTS, Hamilton Avenue at Gowanus Canal, Brooklyn	Brooklyn 7	Brooklyn CDs 2, 6, 7, 8, 9, 10, 14, 16, 17 and 18
Converted MTS ⁽¹⁾	DSNY Southwest Brooklyn Converted MTS, Shore Pkwy at Bay 41 st Street, Brooklyn	Brooklyn 11	Brooklyn CDs 11, 12, 13 and 15
Converted MTS ⁽¹⁾	DSNY East 91 st Street Converted MTS, Manhattan	Manhattan 8	Manhattan CDs 5, 6, 8 and 11
Converted MTS ⁽¹⁾	DSNY North Shore Converted MTS, 31 st Avenue and 122 nd Street, Queens	Queens 7	Queens CDs 7 through 14
Truck-to-Rail TS	Waste Management Harlem River Yard, 98 Lincoln Avenue, Bronx	Bronx 1	Bronx CDs 1 through 12
Truck-to-Rail TS ⁽²⁾	Allied Waste Services, East 132 nd Street Transfer Station, Bronx and Oak Point Rail Yard, Oak Point Avenue and Barry Street, Bronx	Bronx 1	Bronx CDs 1 through 12
Truck-to-Rail TS	Waste Management, 215 Varick Avenue, Brooklyn	Brooklyn 1	Brooklyn CDs 1, 3, 4 and 5
Truck-to-Rail TS	Allied, 72 Scott Avenue-598 Scholes Street, Brooklyn	Brooklyn 1	Brooklyn CDs 1, 3, 4 and 5
Truck-to-Rail/Barge TS ⁽³⁾	Waste Management, 30-58 Review Avenue, Queens and the LIRR Maspeth Rail Yard, Maspeth Avenue and Rust Street Queens	Queens 2	Queens CDs 1 through 6
Waste-to-Energy Facility ⁽⁴⁾	Port Authority of New York and New Jersey, Essex County RRF, Newark, New Jersey	N/A	Manhattan CDs 1, 2, 3, 4, 7, 9, 10 and 12
Truck-to-Rail Transfer Station ⁽⁵⁾	DSNY Staten Island Transfer Station West Service Road, Staten Island	Staten Island 2	Staten Island CDs 1 through 3

Notes:

- ⁽¹⁾ From among the selected proposers responding to DSNY's MTS RFP, DSNY will award one or more contracts for the acceptance, transport and disposal of containerized waste from the Converted MTSs.
- ⁽²⁾ This facility would include use of an off-site intermodal rail yard, as noted in the Table, where containers would be loaded onto railcars.
- ⁽³⁾ Pending the outcome of negotiations between DSNY and Waste Management of New York, LLC, the Review Avenue Transfer station would be modified to operate as a truck-to-truck-to-rail facility. Operating in a truck-to-rail mode will require use of the Maspeth intermodal rail yard, located within 1 ½ miles of the facility, where containers would be loaded onto railcars.
- ⁽⁴⁾ The Essex County RRF is a permitted and operating waste-to-energy facility in Newark, New Jersey. DSNY-managed Waste would be delivered in collection vehicles to this facility or via hopper barges from the existing MTSs, if an enclosed barge unloading facility (EBUF) were to be developed in the vicinity of the Essex County RRF some time in the future.
- ⁽⁵⁾ The Staten Island Transfer Station was approved in the 2000 SWMP, based on an environmental review in the 2000 Plan FEIS. The facility is fully permitted and under construction. It is listed here since it is part of the SWMP.

- 14% of DSNY-managed Waste is moved to out-of-City disposal sites by rail; and
- 38% of DSNY-managed Waste is moved to out-of-City disposal sites in DSNY collection vehicles.⁴

The following considerations guided the formulation of the Long Term Export Program:

- Reducing the City's dependence on transport by transfer trailer to disposal sites is a priority. Some 93% of all truck-transferred DSNY-managed Waste is disposed in landfills and most of the landfills under contract are within a radius of 200 miles of the City. A combination of factors is causing the depletion of this capacity and an increase in disposal price. The recent re-bidding of some Interim Export contracts that rely on truck transport to landfills has reflected an average increase of 19% over the initial contract prices.
- Remote disposal capacity remains available, but truck-based transfer to these sites is not economically viable.
- Developing a barge/rail transport system capable of accessing this remote capacity could offset potential increases in disposal costs.
- Developing a long-term solution should be equitable to the greatest extent possible.
- Any long-term solution should be able to be implemented without causing significant adverse impacts.

The proposed Long Term Export Program is a comprehensive plan that balances the City's need to export waste over the long term in a comprehensive manner, with the environmental benefit of significantly reducing the transfer trailer traffic associated with Interim Export. Its major advantages include the following:

- DSNY-managed Waste delivered to private transfer facilities in the Bronx, Brooklyn and Queens will be exported by barge or rail and, depending on the outcome of negotiations, the Commercial Waste processed at these facilities may also be exported by barge or rail.
- The in-City facilities proposed would be developed on existing sites at either MTSS or private transfer stations.

⁴ Includes Interim Export from Manhattan and Staten Island.

- The proposed combination of facilities provides the City with redundancy in the DSNY-managed Waste system that accommodates future increases in waste generated in the City as a function of population growth. Occasional conditions that may affect certain components of the system will not disrupt future waste export.
- Use of existing private transfer station and Essex County RRF capacity: (i) allows some components to be implemented on a faster timetable; and (ii) minimizes City investment in new capital projects.
- The Converted MTSs will provide capacity that could be available to containerize Commercial Waste for barge/rail export. (This advantage is addressed in more detail in Section 4.)
- The projected economics of the Proposed Action are less costly to the City than the Mayor's original plan to develop eight Converted MTSs. Attachment XI presents an economic analysis of the cost of implementing the SWMP and discusses how new or modified facilities will be financed.

3.3.2 Program Milestones

Table 3.3-2 presents the anticipated Milestones for implementing the Long Term Export Program.

**Table 3.3-2
SWMP Milestones – Long Term Export**

PROGRAM Milestone	Scheduled Fiscal Year	SWMP Section
PROPOSED ACTION – LONG TERM EXPORT FACILITIES AND SERVICES		
DSNY HAMILTON AVENUE CONVERTED MTS, HAMILTON AVENUE AT GOWANUS CANAL, BROOKLYN		
Complete procurement and award Transport & Disposal contract	2007	See Section 3.2
Complete design and permitting	2007	See Section 3.2
Complete construction and begin facility operation	2010	See Section 3.2
DSNY SOUTHWEST BROOKLYN CONVERTED MTS, SHORE PKWY AT BAY 41ST STREET, BROOKLYN		
Complete procurement and award Transport & Disposal contract	2007	See Section 3.2
Complete design and permitting	2007	See Section 3.2
Complete construction and begin facility operation	2010	See Section 3.2

Table 3.3-2 (continued)
SWMP Milestones – Long Term Export

PROGRAM Milestone	Scheduled Fiscal Year	SWMP Section
PROPOSED ACTION – LONG TERM EXPORT FACILITIES AND SERVICES		
DSNY EAST 91ST STREET CONVERTED MTS, MANHATTAN		
Complete procurement and award Transport & Disposal contract	2007	See Section 3.2
Complete design and permitting.	2007	See Section 3.2
Complete construction and begin facility operation	2010	See Section 3.2
DSNY NORTH SHORE CONVERTED MTS, 31ST AVENUE AND 122ND STREET, QUEENS		
Complete procurement and award Transport & Disposal contract	2007	See Section 3.2
Complete design and permitting	2007	See Section 3.2
Complete construction and begin facility operation	2010	See Section 3.2
BRONX LONG TERM EXPORT PROCUREMENT		
Complete contract negotiations and award contract	2007	See Section 3.2
Complete design permitting and construction, if required, ⁵ and begin facility operation	2007	See Section 3.2
BROOKLYN LONG TERM EXPORT PROCUREMENT		
Complete contract negotiations and award contract	2007	See Section 3.2
Complete design, environmental review, permitting and construction and begin facility operation	2009	See Section 3.2
QUEENS LONG TERM EXPORT PROCUREMENT		
Complete contract negotiations and award contract	2007	See Section 3.2
Complete design, environmental review, permitting and construction and begin facility operation	2009	See Section 3.2
INTERMUNICIPAL PROCUREMENT FOR DISPOSAL SERVICES AT A REGIONAL WASTE-TO-ENERGY FACILITY		
Complete contract negotiations, award contract and commence service	2007	See Section 3.2
STATEN ISLAND TRANSFER STATION		
Complete facility construction	2007	See Section 3.1 and Table 3.2-1
Begin facility operations and implement long term service agreement for container rail transport and disposal	2007	See Section 3.1 and Table 3.2-1
CONVERTED MTS REPORTING/PERMITTING		
Report to Council on RFP process/permit approvals for MTSs	2008	See Section 3.7
Report to Council if any of the MTS agreements are not finalized by 2010 and recommend proposed SWMP modification on handling residential solid waste	2010-11	See Section 3.7
ALTERNATIVE TECHNOLOGY EVALUATION AND PLANNING		
Issue Phase 2 Alternative Technology Evaluation	2007	See Section 5.2
Evaluate development of a pilot project to establish the basis for commercial application	2007	See Section 5.2

⁵ Only one of the two private waste transfer stations in the Bronx requires permit modifications and construction.

3.4 Summary of Facility Operations

3.4.1 Converted MTSs

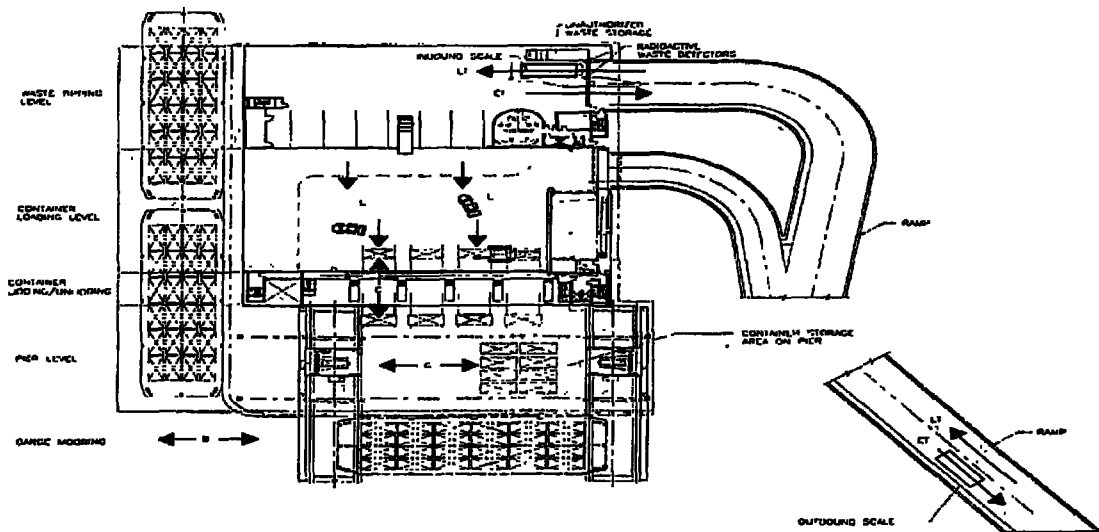
The four Converted MTS facilities have a common three-level processing building design. Figure 3.4-1 provides a schematic of plan and section views of a typical Converted MTS that depicts the following operational features:

- Collection vehicles enter a tipping floor at the uppermost level and tip waste onto the second-level loading floor, 12 feet below;
- On the loading floor, waste is sorted and pushed by front-end loaders through slots in the floor directly over intermodal containers, located on the first level of the processing building;
- Equipment operating over the slots in the loading floor evens and tamps the waste in the containers, which are then lidded with leakproof gasketed covers and moved by trolley to the external pier level of the facility;
- A gantry crane on the pier loads full containers onto and unloads empty containers off of a flatbed barge moored to the pier;
- Each barge has a capacity for 48 containers; and
- Tugboats move full/empty barges directly to an out-of-City disposal site⁶ or between the MTS and an intermodal transloading facility where they are loaded onto railcars or a larger barge for transport to a disposal facility.

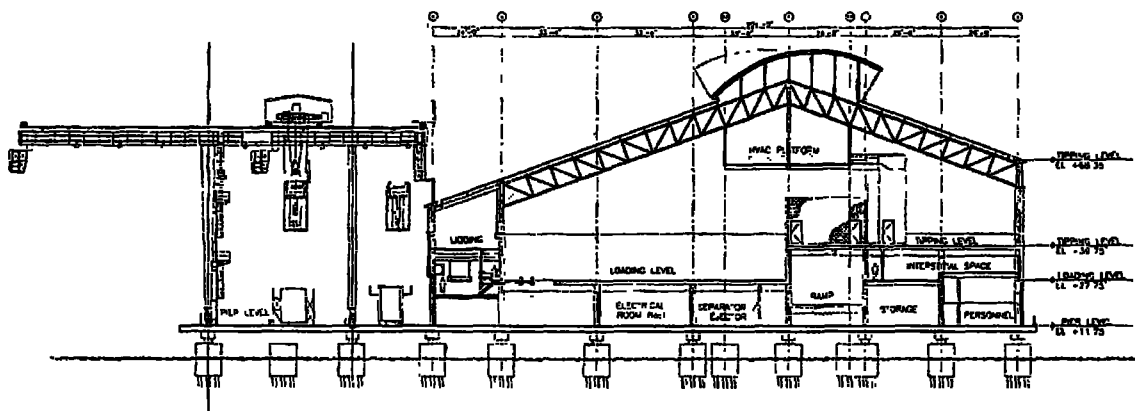
The intermodal containers are approximately 20 feet long, 12 feet high and 8½ feet wide. They are capable of holding approximately 62 cubic yards of refuse. The density of the waste entering the container is increased from approximately 450 pounds per cubic yard to approximately 700 pounds per cubic yard by tamping. On average, it is estimated that each container will contain approximately up to 22 tons of waste.

⁶ DSNY has released an RFP for the handling of MTS containerized waste and negotiations with potential vendors are ongoing.

Figure 3.4-1



Plan View



Section View

3.4.1.1 MTS-Containerized Waste Disposal

Subject to the outcome of negotiations between DSNY and the proposers selected pursuant to the MTS containerization RFP, containerized waste will be transported by barge from the Converted MTSs directly to (i) a disposal site; or, (ii) intermodal terminals, where the containers will be transloaded to railcars or a larger barge for transport to an out-of-City disposal facility.

The City has determined that it would be in its best interests to seek proposals that enable DSNY not to rely on a single facility to handle containers from the MTSs, provided that the use of more than one transloading facility is operationally and technically feasible. In contracting with a vendor or vendors to handle the City's MTS containerized waste, in August 2006, DSNY issued a request for a Best and Final Offer (BAFO) in connection with the Request for Proposals for handling waste at the four MTSs. The BAFO specifically seek proposals on alternative facilities at which containerized waste from its MTSs can be transloaded and, subject to the limitations above, the City will not contract to transload annually more than 75% of the containers generated at the MTSs at any single in-city transloading facility. This provision shall not be mandatory or in any way binding if, over a twenty year term of any agreement to transport and dispose of containerized waste from MTSs, the estimated additional cost to the City of utilizing more than one facility exceeds by \$100 million the estimated cost that the City would pay in the absence of this provision 3.4.1.1.

3.4.2 Converted MTS Capacities

In order to define the average and peak hourly design capacities of the Converted MTSs, historical data regarding truck and tonnage arrival rates from FY 1998 were evaluated and analyzed. Based on this analysis, it was determined that a Converted MTS would be designed with a tipping floor to accommodate 30 collection vehicles per hour and a loading level to process and containerize 220 tons of MSW per hour. If the facility were to operate at full capacity over an entire day (i.e., three shifts with a productivity of 6.5 hours per shift), it could process 4,290 tons of waste. DSNY has proposed specific permit limits for the Converted MTSs that reflect the DSNY-managed Waste that would be generated in the respective wasteshed for each MTS and the amount of Commercial Waste that could be processed in nighttime hours without causing noise impacts, as determined in the FEIS, that are lower than the nominal

design capacity. Although the design capacity of the Converted MTSs is 4,290 tpd, Table 3.4-1 presents expected throughput capacities at the Converted MTSs for DSNY-managed Waste, based on average tpd and average peak tpd of DSNY-managed Waste generated in the wastesheds served by the MTSs facilities and also including Commercial Waste.⁷ The average and average peak day tpd are numbers that DSNY has used for planning purposes and in draft permit applications and are consistent with the environmental review in the FEIS. There would be occasions, subject to permit limits, when the full design capacity of the Converted MTSs would be required to deal with upset conditions in the City's waste management system. The classic example of this is following a snow emergency, when several days of waste have accrued. Also, unanticipated outage conditions in one element of the system could require temporary shifts in waste deliveries among the Converted MTSs.

**Table 3.4-1
Converted MTS Average Throughputs**

Converted MTS Location	(1) DSNY Average TPD	(2) Average Peak Day TPD	(3) Commercial Tonnage (Noise Constrained)⁽¹⁾ TPD	Total (Sum of Columns 2 and 3)
SWMP Export Facilities				
Hamilton Avenue	1,900	2,280	1,274	3,554
Southwest Brooklyn	950	1,140	828	1,968
East 91 st Street	720	864	780	1,644
North Shore	2,200	2,640	1,000	3,640

Note:

⁽¹⁾ This total includes the potential for processing Commercial Waste that is presented as a Proposed Action in Section 4.

⁷ The subject of potentially processing Commercial Waste at the Converted MTSs is addressed in Chapter 4.

3.4.2.1 Converted MTS Community Advisory Groups

Within six months of the effective date of this SWMP, DSNY shall establish four Community Advisory Groups (“CAGs”) in the respective Community Districts that host Converted Marine Transfer Stations. The CAGs will advise the Mayor and other elected officials on the development, construction and operation of the respective Converted MTSS.

The CAGs shall consist of no fewer than ten members, four appointed by the Mayor, three appointed by the borough president where the respective Converted MTS is located and three appointed by the council member elected from the council district in which the respective Converted MTS is located. The membership of each Community Advisory Group shall represent community boards, environmental and environmental justice organizations, business organizations, property owners, other local community groups and concerned members of the general public.

Members shall serve for a term of two years without compensation and shall designate one member to serve as chairperson and one as vice-chairperson. No member may serve more than two consecutive terms. The Community Advisory Groups shall exist for ten years, at which time the City Council and the Administration will evaluate their effectiveness and continued merit, and jointly determine whether the program should be extended.

3.4.3 Private Transfer Stations

All of the five private transfer stations included in the SWMP are existing facilities. Of the five existing facilities, four would require permit modifications to facilitate barge or rail export and/or expansions of their existing permitted capacities. Table 3.4-2 provides a summary of the permitted status of these facilities, proposed capacity expansions where applicable, other required permit modifications where applicable, and DSNY wastesheds served. Where an expansion of capacity is proposed (see Table 3.4.2), the BQB RFPs require that waste companies make arrangements to offset these proposed capacity expansions in their respective project service areas, except the Queens procurement, which requires that offsets be obtained in Brooklyn Community District 1 or Queens Community District 12.

**Table 3.4-2
Private Transfer Station Capacities**

Facility	Community District Location/Wasteshed Served	Current Permitted Capacity (TPD)	Proposed Expansion Increment (TPD)	Other Permit Modifications	Average Peak Day DSNY Waste (TPD) ⁽¹⁾	Commercial Waste Processed (Yes/No)
Allied Waste Services, East 132 nd Street, Truck-to-Truck-to-Rail Transfer Station, Bronx	Bronx 1/ Bronx CDs 1 through 12	2,999	None	Addition of lidding facility	2,337	Yes
Waste Management, Harlem River Yard, Truck-to-Rail Transfer Station	Bronx 1/ Bronx CDs 1 through 12	4,000	None	None	2,337	Yes
Waste Management, 215 Varick Avenue, Truck-to-Rail Transfer Station, Brooklyn ⁽²⁾	Brooklyn 1/ Brooklyn CDs 1, 3, 4 and 5	4,250	None	Containerization floor plan, lidding area, container storage area and rail siding for loadout of containers onto railcars.	1,114	Yes
Allied Waste Services, 72 Scott-598 Scholes, Truck-to-Rail Transfer Station, Brooklyn	Brooklyn 1/ Brooklyn CDs 1, 3, 4 and 5	220	1,148	Consolidation of operations among three separate facilities, rail improvements	1,114	Yes
Waste Management, 30-58 Review Avenue, Truck-to-Truck-to-Rail Transfer Station, Queens with containers drayed to Maspeth railyard	Queens 2/ Queens CDs 1 through 6	958	417 ⁽³⁾	A modified facility, sized to process waste from Queens CDs 1 through 6 (an increase of one CD in the wasteshed delivering to the current facility) will be developed at the site of the existing transfer station. ⁽⁴⁾	1,375	To be determined

Notes:

- ⁽¹⁾ Average peak day values are those used in FEIS.
- ⁽²⁾ Reflecting negotiations with Waste Management, this facility replaces its 485 Scott Avenue Facility. It was not evaluated in the FEIS and the permit modification is subject to environmental review.
- ⁽³⁾ This is the difference between the existing permit capacity of 958 tpd and a proposed weekly permit limit of 8,251 tons per week, which on a 6 day average week basis equates to 1,375 tpd. The 1,375 tpd value is derived from actual FY 2006 data for a 6-week period from May 22 through July 1 during which average day deliveries were 1,146 tpd. This average day value was increased by 20% to provide a margin for future growth and contingency.
- ⁽⁴⁾ This facility modification is subject to a new environmental review to support the permit expansion.

3.4.4 Transloading Facilities

Upon completion of containerizing waste at the MTSs, the containers will need to be transported to out-of-city disposal sites. Prior to such export, in most cases the containers will need to be transloaded from the barges originating at the MTSs to either trains or ocean-going barges for transport to disposal locations. To the extent that such operations occur at a transloading facility within the City, it is in the City's best interests that MTS-originated containers be transported to their final disposal location as expeditiously as possible and that such containers not be stored at the transloading facility, or otherwise remain at such facility any longer than necessary to complete the transloading of the containers and preparation for shipment or other transport to a final disposal location. To meet these goals, the City will make reasonable efforts, subject to normal operating conditions and operational feasibility and practicability, to ensure that at an in-city intermodal facility (i) the time from which any MTS-originated container is removed from a barge to the premises of such facility and is transloaded onto another barge or railcar for ultimate transport out of the City shall not exceed 24 hours; (ii) under no circumstances shall the time from which any MTS-originated container is removed from a barge to the premises of such facility and is transloaded onto another barge or railcar for ultimate transport out of the City exceed 48 hours; and (iii) that on an annual basis, at least 50% of the containers handled by such facility shall be transloaded to a barge for final disposal and no more than 50% of the containers handled by such facility shall be transloaded to a railcar for transport to a final disposal location.

3.4.5 Council Review of Modifications to the SWMP

If DSNY proposes a permanent alteration in the manner in which five (5) percent of the City's residential waste stream or ten (10) percent of the City's overall waste stream is handled, DSNY must submit such proposal to the Council. The Council shall have sixty (60) days from the date it receives such proposal to vote on a local law that either approves or rejects DSNY's proposed modification to the SWMP. If the Council fails to pass a local law within this sixty-day time period that either approves or rejects the proposed modification, the proposed modification shall be deemed approved.

3.5 Existing Programs

DSNY's operations also include refuse and Recyclable collections and Interim Export. These and other existing DSNY activities are described in Attachment VIII and Appendix E.

3.6 Future Manhattan Capacity

The Proposed Actions for Long Term Export Facilities and Contracts described in Section 3.3, together with the proposed use of the West 59th Street MTS for Commercial Waste Transfer described in Section 4.3.2.1 and the proposed Gansevoort Recycling and Education Center for Manhattan metal, glass, plastic and paper described in Section 2.3.2 will allow Manhattan to handle more waste and recyclables within the borough. However, there are still significant amounts of commercial and residential waste that will leave the borough for handling and export. The proposed Gansevoort facility may require an amendment to the Hudson River Park Act, the approval of which is uncertain at this time.

DSNY will continue to investigate potential alternative solid-waste-transfer station locations in Manhattan and will do so on a strict timeline, stated herein, while seeking approvals for the West 59th Street and Gansevoort MTSs. Specifically, DSNY will seek a location or locations with the collective capacity to transfer up to 3,000 tpd of Commercial Waste. DSNY may accomplish this through additional siting studies, Requests for Expressions of Interest or other means.

DSNY will report to the Council on January 1st of each year, beginning on January 1, 2008, as to what efforts have been made to identify alternative transfer station locations.

The City shall issue an RFP for the use of the West 59th Street MTS no later than six months after adoption of the SWMP by the Council. No later than 18 months from the date of the adoption of the SWMP by the Council, the City shall report to the Council as to the progress of the RFP process and any other approvals needed to use this facility for commercial waste processing. If by three years from the date of approval of the SWMP by the Council the City does not have an executed agreement for the use of the West 59th Street facility or the Gansevoort facility, the City will report to the Council on the status of these facilities and will make recommendations as appropriate to address the handling of Manhattan's commercial waste

and recyclables through the submission to the Council of a proposed modification to the SWMP. The proposed modification may include, without limitation, a new timeline for completing an agreement for use of the West 59th Street facility and/or the Gansevoort facility or a new proposal for handling some or all of Manhattan's commercial waste or recyclables.

The scheduled timetables for milestones for the development of Manhattan commercial waste capacity described in this Section are set forth in Table 4.3-1, SWMP Milestones – Commercial Waste. The scheduled timetable for the development of the Gansevoort Recycling and Education Center for Manhattan is set forth in Table 2.5-1, SWMP Milestones – Recycling.

3.7 MTS Reporting and Permitting

No later than 18 months from the date of the adoption of the SWMP by the Council, the City shall report to the Council on the progress of the RFP process and any other approvals needed to use the 4 MTSs. If any of the agreements for the 4 MTSs are not finalized within four years of the adoption of the SWMP by the Council, then the City will report to the Council on the status of these facilities and will make recommendations as appropriate to address the handling of the City's residential waste through the submission to the Council of a proposed modification to the SWMP. The proposed modification may include, without limitation, a new timeline for finalizing agreements for any of the 4 MTSs or a new proposal for handling the City's residential waste, including alternative MTS sites.

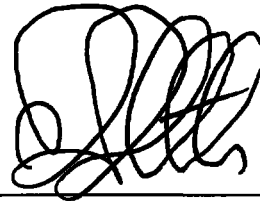
With respect to the permitting of the MTSs for the handling of putrescible waste, DSNY will only seek permits consistent with the tonnage information set forth in the Final Environmental Impact Statement, provided, however, that if the amounts of residential waste generated or collected in the waste shed served by the relevant MTS is at any point in time higher than the amount set forth in the FEIS, the MTS permits can be amended to reflect such increased amounts of residential waste generated or collected.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2011, a copy of the foregoing **Reply of New York & Atlantic Railway Company to Amended Petition for Declaratory Order** was served by overnight delivery upon:

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A handwritten signature in black ink, appearing to read 'T. Litwiler', is positioned above a horizontal line.

Thomas J. Litwiler